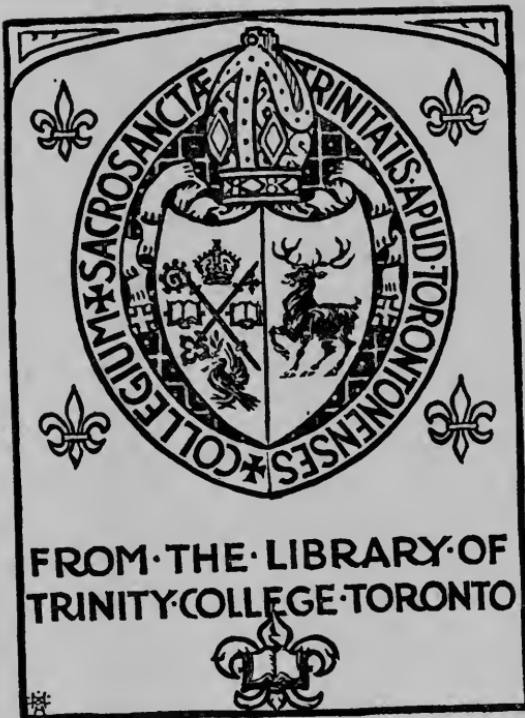
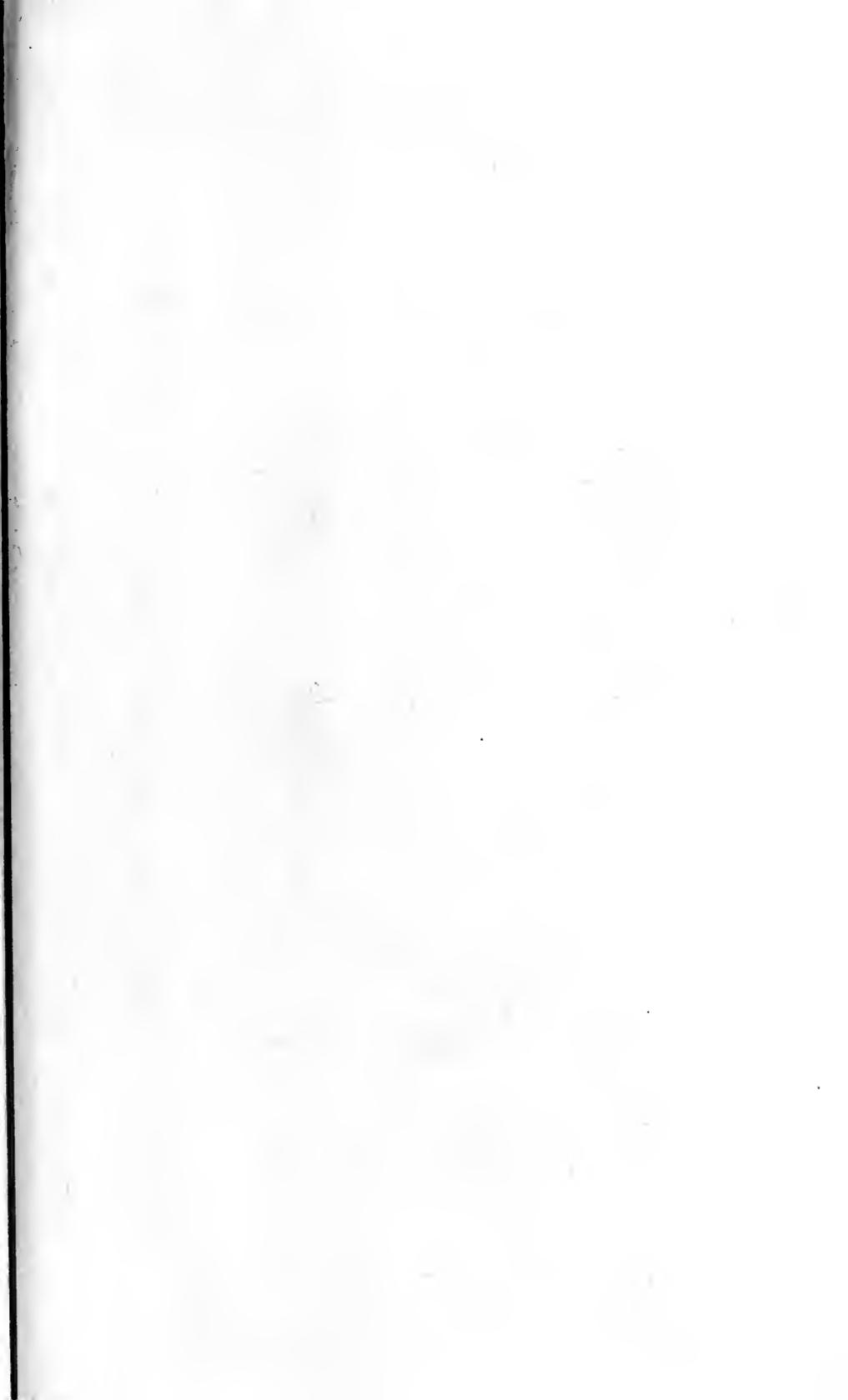


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**FULL REPORT** *Canada*

OF THE CASE OF

**MASTIN v. ESCOTT, CLERK,**

FOR

REFUSING TO BURY AN INFANT BAPTIZED BY  
A WESLEYAN MINISTER;

CONTAINING ALL THE

**ARGUMENTS ON BOTH SIDES**

AND

**THE JUDGMENT**

DELIVERED BY

THE RIGHT HONOURABLE SIR HERBERT JENNER,

IN

*The Arches Court of Canterbury.*

MAY 8TH, 1841;

WITH

**AN APPENDIX OF DOCUMENTS.**

—  
BY

**W. C. CURTEIS, LL.D.**

ADVOCATE IN DOCTORS' COMMONS.

—  
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## ADVERTISEMENT.

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THE question involved in this Case being one of great importance to the Clergy of the Established Church, as well as to the whole body of Dissenters, the Editor hopes, that the Report of it published in its present form will be more acceptable than if it were given less at length.

W. C. C.

*Doctors Commons,*

June 3, 1841.



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## In the Arches Court of Canterbury.

THE OFFICE OF THE JUDGE PROMOTED BY

MASTIN *against* ESCOTT.

THIS was a proceeding instituted by Mr. Frederick George Mastin, of Gedney in Lincolnshire, against the Reverend Thomas Sweet Escott, the vicar of that parish, "for refusing to bury the corpse of "Elizabeth Ann Cliff, the infant daughter of Thomas and Sarah "Cliff, of the parish of Gedney, convenient warning having been "given him thereof." The proceedings commenced in this Court by virtue of Letters of Request from the chancellor of the diocese of Lincoln.

The Articles, which were admitted without opposition, were in substance as follows :

The 1st, 2d, and 3d articles pleaded the incumbency of Mr. Escott, and his obligation as a priest or minister of the Church of England to observe the laws, canons and constitutions ecclesiastical of this realm.

4th. That by the 68th canon, entitled "Ministers not to refuse "to christen or bury," it is decreed, ordained and contained as follows :—"No minister shall refuse or delay to christen any child "according to the form of the Book of Common Prayer, that is "brought to the church to him upon Sundays or holydays to be "christened, or to bury any corpse that is brought to the church or "churchyard, convenient warning being given him thereof before, "in such manner and form as is prescribed in the said Book of "Common Prayer; and if he shall refuse to christen the one, or "bury the other (except the party deceased were denounced ex- "communicated *majori excommunicatione* for some grievous and "notorious crime, and no man able to testify of his repentance), he "shall be suspended by the bishop of the diocese from his ministry "by the space of three months."

5th. That notwithstanding the premises, and in contempt of the law and canon aforesaid, Mr. Escott did, on two several occasions, happening respectively on the 16th and 17th of December 1839, expressly declare his determination not to bury in the churchyard of Gedney aforesaid the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas Cliff and Sarah Cliff his wife, of the parish of Gedney aforesaid, if brought for burial to the said church or churchyard: and that accordingly, and in pursuance of such declared determination, the said T. S. Escott, on the 17th day of the said month of December, or on some other day in the said month, did, contrary to his duty, refuse to bury in the churchyard of Gedney aforesaid the corpse of the said Elizabeth Ann Cliff, then brought to the said church or churchyard, convenient warning having been given him thereof.

6th. That the said Elizabeth Ann Cliff, the infant aforesaid, died within the parish of Gedney, and that such infant, being the daughter of Thomas Cliff and Sarah Cliff his wife, who are Protestants of the class of people commonly called or known as Wesleyan Methodists, and who were in the months of August, September, October, November, and December 1839, and had been for some time previous thereto, in the habit of frequenting or resorting to a chapel or place of religious worship established by, or for the use of, a congregation of the said class of people, situate within the said parish of Gedney, had been first, to wit, on or about the 1st day of October 1839, baptized according to the rite or form of baptism generally received and observed among the said class of people commonly called or known as Wesleyan Methodists, that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Balley, a minister, preacher, or teacher of the said class of people. That of the aforesaid fact of baptism the said Thomas Sweet Escott was informed, as well on the 16th day of the said month of December 1839, by the said Thomas Cliff, as on the morning of the said 17th day of the said month, by the Reverend Robert Bond, also a minister of the said class of people commonly called or known as Wesleyan Methodists, when they respectively urged and intreated him, on such two several occasions, to consent to bury the corpse of the said infant; and that by means of such information, as well as by other means, the said Thomas Sweet Escott was, previous to,

and at the time of his refusal to bury the said corpse, well and sufficiently apprised and aware of such fact of baptism; and that on each of the two several occasions aforesaid, as also subsequently on the said 17th day of December, when the corpse of the said infant having been brought to the churchyard of the said parish, application was made to him for the burial thereof in the said churchyard, in the manner and form prescribed by the Book of Common Prayer, he did make or assign the aforesaid fact of baptism expressly as the pretext or ground of refusing to comply with such entreaties and application.

7th. That Mr. Escott, for such the offence in the preceding articles set forth, ought to be canonically corrected and punished.

8th, 9th, and 10th, the usual formal articles.

The whole of the articles, with the exception of the 5th, 6th, and 7th, were admitted to be true: and for the proof of those articles witnesses were produced and examined on the part of Mr. Mastin.

An allegation was afterwards brought in by way of defence on the part of Mr. Escott, pleading:—

*First, that* in forming his determination not to bury the corpse of Elizabeth Ann Cliff, and in refusing to read the burial service at its interment, he did not act in contempt of the laws, canons, and constitutions ecclesiastical of the Church of England, but that, on the contrary, he acted in obedience to, and in conformity with, the obligations by which he bound himself when he became an ordained minister of the Church of England. *Second, that* in the preface to the *Form and Manner of Making Deacons*, as established by the Liturgy of the Church of England, it is expressly set forth and provided, “that none shall be accounted or taken to be a lawful Bishop, “Priest, or Deacon, in the united Church of England or Ireland, or “sufficient to execute any of the said functions, except he be called, “tried, examined and admitted thereto according to the form here- “after following, or hath had formerly episcopal consecration or “ordination.” *Third, that* whereas it is pleaded in the sixth Article that the deceased had been baptized by a minister, preacher, or teacher of the class called Wesleyan Methodists, such minister was unordained; and that any rite or form of baptism performed by him is to all intents and purposes null and void, in the sense of, and according to, the articles, canons, and rubric of the Church of

England. *Fourth*, that from and after the Conferences holden at Hampton Court, in 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives, under licence from the Bishops of their respective dioceses, and which practice had up to that period been tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm assembled at the said conferences; and in order to give effect to such repudiation, King James I. directed an alteration to be made accordingly in the Liturgy of the Church of England, and from that period the Liturgy has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary. *Fifth*, that in the Liturgy, “imprinted by the deputies of Christopher Barber,\* printer to the Queen's Most Excellent Majesty, A.D. 1595,” in the part entitled “Of them that be Baptized in Private Houses,” the rubric directs as follows:—“First, let them that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child, and dip him in water, or pour water upon him, saying these words—‘I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’” *Sixth*, that the Liturgy of the Church of England, entitled “The Book of Common Prayer, with the Psalter or Psalms of David, of that Translation which is Appointed to be Used in Churches, imprinted at London by Robert Barber, printer to the King's Most Excellent Majesty, 1606, cum privilegio,” in the part entitled “Of them that are to be baptized in private houses in the time of necessity by the minister of the parish, or any other lawful minister that can be procured,” the rubric enjoins as follows:—“First, let the lawful minister and them that be present call upon God for His grace, and say the Lord's Prayer, if the time will suffer, and then the child being named by some one that is present, the said lawful minister shall dip it in water, or pour water upon it, saying these words, ‘I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’” *Seventh*, that in the rubric of the Book of Common Prayer, which is a part and parcel of the statute 13th and 14th Car. II. c. 4, in the order for burial of the dead, it is enjoined that such office is not to be used for any that

\* This should be read Barker, but we have preferred to copy the pleadings though incorrect.

die unbaptized, or excommunicate, or have laid violent hands upon themselves. *Eighth*, that the 68th canon of 1603, referred to in the fourth of the articles, can only be taken and construed in conjunction with, and in reference to, the other canons promulgated in the same code: and that by the 9th canon it is decreed that “ whosoever shall hereafter separate themselves from the communion of Saints as it is approved by the Apostles’ rules, in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians who are conformable to the doctrine, government, rites, and ceremonies of the Church of England, to be profane and unmeet for them to join with in Christian profession, let them be excommunicated *ipso facto*, and not restored but by the Archbishop after their repentance and public revocation of such their wicked errors;”—and by the 12th canon, it is decreed, that “ whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King’s authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated *ipso facto*, and not be restored until they repent and publicly revoke those their wicked and anabaptistical errors;”—by the 5th canon it is decreed, that “ whosoever shall hereafter affirm that any of the Thirty-nine Articles, agreed upon by the Archbishops and Bishops of both Provinces, and the whole clergy, in Convocation holden at London in 1562, for avoiding diversities of opinions, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as may not with a good conscience be subscribed unto, let him be excommunicated *ipso facto*, and not restored, but only by the Archbishop, after his repentance and public revocation of such his wicked errors.” *Ninth*, that by the 23d of the Thirty-nine Articles it is decreed, that “ it is not lawful for any man to take upon him the office of public preaching or ministering the Sacraments in the congregation, before he be lawfully called and sent to execute the same; and those we ought to judge lawfully called and sent which be chosen and called to this work by men who have public authority given unto them in the congregation to call and send ministers into the Lord’s vineyard.” *Tenth*, that by the 25th of the Thirty-nine Articles it is

decreed, that "there are two Sacraments ordained of Christ our "Lord in the Gospel, that is to say, Baptism and the Supper of the "Lord;"—that Elisha Balley never was, and is not, a lawful minister, and never hath received episcopal ordination or consecration, and that by reason of the premises, Elizabeth Ann Cliff was not in fact baptized by him, but the said pretended baptism, if performed as alleged, was altogether invalid, and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions, and rubrics hereinbefore set forth.

*Eleventh,* that the ecclesiastical doctrines and discipline of the class of people commonly called Wesleyan Methodists are entirely and in all things founded on, and received from, and in accordance with the doctrines and discipline published, preached, delivered, and appointed to be observed amongst them by the late Reverend John Wesley, the founder of their sect; and that the several doctrines, rules, directions, matters, and things contained in a certain book or tract, usually denominated by the said class of people "The Large Minutes," otherwise, "Minutes of Several Conversations between the Reverend Mr. Wesley and others, from the year "1744 to the year 1789," and also in a certain other book or books, commonly called "The Sermons," otherwise "Sermons on "Several Occasions," delivered and published by the said Reverend John Wesley, were and are commonly accounted and received by and amongst the said class of people, as and for the doctrines, rules, and directions by which the said class of people are, and hold themselves to be, bound and governed, in matters of religious doctrine, rites, and discipline; and were, and are, in all things fully received, believed, followed, and obeyed by the said class of people; and were, and are, of full force and effect amongst the said class of people: that every person, according to the language used by the said class of people "received into full connexion," is presented with a copy of the said "Minutes" thus inscribed—"As long as "you freely consent to and earnestly endeavour to walk by these "Rules we shall rejoice to acknowledge you as a Fellow-labourer:" that in the said first mentioned tract, or book, usually denominated by the said class of people "The Large Minutes,"\* it is amongst other things set forth as follows, that is to say, "A Methodist "Preacher is to mind every point, great and small, in the Methodist

\* Wesley's Works, edit. 1830, vol. viii. pp. 310, 326, 330.

" Discipline;" and that in another part of the said tract or book it is set forth as follows, that is to say, " Q. In what form may a " House be settled ? A. In the following, which was done by three " of the most eminent lawyers in London—whoever therefore objects " to it only betrays his own ignorance ;" and that immediately afterwards there is therein set forth a printed form of a trust deed or indenture, and that in the said deed or indenture there is a clause in the words, or to the effect following, that is to say, " Provided " always that the persons preach no other doctrine than is contained " in Mr. Wesley's notes upon the New Testament, and four volumes " of Sermons :" that in one, namely, in the 115th of the aforesaid " Sermons,"\* otherwise, " Sermons on Several Occasions," delivered and published by the said Reverend John Wesley, which is entitled, " The Ministerial Office," (the text prefixed to which sermon is as follows, that is to say, " No man taketh this honour unto " himself, but he that is called of God, as was Aaron," Heb. v. 4,) it is, amongst other things, set forth as follows, that is to say, " In " 1744 all the Methodist preachers had their first conference, but " none of them dreamed that the being called to preach gave them " any right to administer the Sacraments, and when that question " was proposed, in what light are we to consider ourselves, it was " answered, as extraordinary messengers raised up to provoke the " ordinary ones to jealousy. In order hereto one of our first rules " was given to each preacher, you are to do that part of the work " which we appoint. But what work was this ? Did we ever ap- " point you to administer sacraments—to exercise the priestly office ? " Such a design never entered into our mind—it was farthest from " our thoughts ; and if any preacher had taken such a step, we " should have looked upon it as a palpable breach of this rule, and " consequently as a recantation of our connexion. 12. For sup- " posing (what I utterly deny) that the receiving you as a preacher " at the same time gave you authority to administer the sacraments, " yet it gave you no other authority than to do it, or any thing else " where I appoint. But where did I appoint you to do this ? No " where at all. Therefore by this very rule you are excluded from " doing it, and in doing it you renounce the first principle of Method- " ism, which was wholly and solely to preach the Gospel. 13. It " was several years after our society was formed before any attempt

\* Wesley's Works, vol. vii. pp. 277, 279.

“ of this kind was made. The first was, I apprehend, at Norwich. “ One of our preachers there yielded to the importunity of a few of “ the people, and baptized their children ; but as soon as it was “ known, he was informed it must not be unless he designed to leave “ our connexion : he promised to do it no more, and I suppose kept “ his promise.” And in another and subsequent part of the said sermon it is set forth as follows, that is to say, “ 18. I wish all “ of you who are vulgarly termed Methodists would seriously con- “ sider what has been said, and particularly you whom God hath “ commissioned to call sinners to repentance. It does by no means “ follow from hence that ye are commissioned to baptize, or admi- “ nister the Lord’s Supper. Ye never dreamed of this for ten or “ twenty years after ye began to preach. Ye did not then, like “ ‘ Korah, Dathan and Abiram, seek the priesthood also.’ Ye knew “ no man taketh this honour unto himself but he that was called of “ God, as was Aaron. O ! contain yourselves within your own “ bounds ; be content with preaching the Gospel ; do the work of “ Evangelists ; proclaim to all the world the loving-kindness of God “ our Saviour ; declare to all ‘ The kingdom of Heaven is at hand, “ repent ye and believe the Gospel.’ I earnestly advise you abide “ in your place ; keep your own station.” *That* by reason of the premises the said Elisha Balley, being as articulate “ a minister, “ preacher, or teacher of the said class or people commonly called “ or known as Wesleyan Methodists,” did not in fact “ baptize the “ said Elizabeth Ann Cliff, according to the rite or form of baptism “ generally received and observed among the said class of people,” inasmuch as being such minister, preacher, or teacher as aforesaid, any pretended baptism by him performed, or attempted, would have been, and was, and is, contrary to the rites or forms commonly used and followed by and amongst the said class or people, and a breach of the rules of the said class or people.

The admission of this allegation was opposed by the Queen’s Advocate Sir John Dodson, Dr. Haggard and Dr. Nicholl. Dr. Phillimore and Dr. Harding appeared to support it.

The *Queen’s Advocate*, on behalf of the promoter, stated, that the offence imputed to Mr. Escott was nearly identical with the case of *Kemp v. Wickes*, decided in 1809, and reported in the 3rd volume of Dr. Phillimore’s Reports, the only difference being

that in that case the person whose burial was refused had been baptized by a minister of the Calvinistic Independents, whereas in this case the child was baptized by a minister of the Wesleyan persuasion. He observed, that it was unnecessary in the present stage of the proceedings to discuss the important point of law involved in the case, and contended that the allegation now offered by the defendant was inadmissible and ought to be rejected, inasmuch as if admitted, and every part of it substantiated by proof, it could not in any way alter the conclusion at which the Court must necessarily arrive,—that if Mr. Escott had intended to raise the question of law, the proper course for him to have adopted would have been to have objected to the admission of the articles; those articles had, however, been admitted without opposition, and witnesses had been examined in support of them; that according to the ordinary and regular mode of proceeding, it was not competent to him to allow the articles to be admitted, and at a subsequent stage to counterplead the law, that the counsel for the defendant had lost their way, and that it was now too late for them to retrace their steps. He then proceeded to comment upon the several articles of the allegation, and submitted that their contents were not material to the issue in the cause—that the averment that Mr. Escott had acted in obedience to his obligations as a minister of the Church of England was matter of argument and not fit to be pleaded, especially in a manner so unprecedented—that the same observation applied to the fact of the child not having been baptized by a minister ordained according to the rites and ceremonies of the Church of England, and to the reference made to the form and manner of making deacons, &c. as established by the Liturgy of the Church of England—that the eleventh article in respect to the duties of Wesleyan ministers might possibly be subject to a different consideration, inasmuch as it does in some measure seem to controvert one or two of the charges made against Mr. Escott, but that its admission would be useless, as it could be attended with no beneficial results, and could only occasion unnecessary expense—that the passage relied upon purported to be quoted from the 115th sermon of Mr. Wesley, whereas the four volumes containing the doctrine of Methodism as laid down by him, only comprised fifty-three sermons—upon these and other grounds he contended that the allegation ought to be rejected.

**Dr. Haggard.**—The question is, whether this infant was unbaptized in the meaning of the rubric affixed to the office of burial of the dead, That must be the question which the Court will ultimately have to decide, and that has been already decided in the case of *Kemp v. Wickes*; Sir John Nicholl there says that the admission of the articles was the proper stage of the cause for taking the decision of the Court upon the point of law. But in this case the articles have been admitted without opposition; witnesses have been examined, and we are not now in a position to go into the question of law. The validity of the baptism might have been denied in the first instance by opposing the admission of the articles; but this had not been done, and the third article of this allegation assumes the point at issue in the cause—the invalidity of the baptism. Can this responsive allegation, if proved, affect the question of law? The point of law was sufficiently raised in the articles. They state that the child was baptized by a Wesleyan; and the defendant contends that he did not disobey the law and canons of the church by refusing to bury the corpse. The point is, what is the true meaning of the word *baptized*? That was decided in the luminous judgment of *Kemp v. Wickes*, where the learned judge stated at length his reasons for pronouncing the opinion he had formed, and the decision in that case, which had been acquiesced in for thirty years, is the law. This is not a proceeding against a Wesleyan minister for acting contrary to the rules of the church; had it been a proceeding of that nature, perhaps the eighth and ninth articles of the allegation, setting forth the canons and articles, might have been admissible; but the present question has no relation to his conduct in baptizing; the whole question being whether lay baptism is to deprive a child of burial rites according to the forms of the Church of England. We undertake to show that the child was baptized with water in the name of the Holy Trinity, in the form prescribed by Christ himself, and that therefore the baptism is good. I might refer to the Conversations of Wesley himself, as stated in the eleventh article of this allegation, to show that the baptism was valid; for though Mr. Wesley disapproved of the rite of baptism being administered by the preachers or teachers of his sect, he still considered it, when done, not invalid, but irregular; *factum valet*. If this allegation were admitted, and all the facts stated in it proved, they could not affect the ultimate judgment of the Court.

*Dr. Nicholl.*—We do not plead that baptism is usually performed among the Wesleyan Methodists; that, when performed for Wesleyans, it is usually performed by a Wesleyan Methodist minister. We have not pleaded that the form of baptism is according to the principles, and doctrines, and precepts laid down by John Wesley; but we have merely pleaded that our form of baptism is orthodox. We have pleaded that the child was baptized “according to the “rite or form of baptism generally received and observed” amongst the Wesleyan Methodists. But we have not left the case there; we have gone further, and have specified particularly what we meant, viz., that the child was baptized “with water, and in the name “of the Father, and of the Son, and of the Holy Ghost.” And the validity of such baptism is the point, and the only point which the Court has to consider. We have pleaded the use of the orthodox form of baptism; namely, the use of that element, and of those words, which are the essentials of baptism. We have further gone on to state by whom the form of baptism was celebrated, namely, by “Elisha Balley, a minister, preacher, or teacher of the said “class of people.” But we do not, in the slightest degree, attach any weight or importance to the fact whether Mr. Balley was or was not a minister, preacher, or teacher. Our line of argument throughout the whole case is, that lay baptism is valid baptism; and therefore it would be absurd to plead as part of a valid baptism, that it was celebrated by a priest or minister of the Wesleyan Methodists. We say that the baptism was performed according to the rite generally received among the Wesleyans; and that it is equally valid, whether administered by a minister of their own persuasion, or, as it has often been, and I hope more generally will be, by a minister of the Church of England. We contend that the children baptized by Wesleyan ministers are uniformly baptized in an orthodox manner. The Court has nothing to do with the precepts and laws of John Wesley. His precepts and laws cannot affect the question; they cannot make that legal which is illegal, nor that valid which is invalid. That is, as it appears to me, a short answer to the long article about the Wesleyan books.

But, to come to the other articles of the allegation. The question is not whether this child is to be considered unbaptized;—not whether this child, in the language of the Church of England, is to be considered unregenerated; but whether the great dissenting

body of this country, baptized by their own ministers, are to be considered unbaptized. That is the question attempted to be raised, and that is the question the Court must decide.

We are at a loss to conceive what new argument or authority can be adduced upon this case, which was substantially decided in the case of Kemp and Wickes, decided thirty years ago, without appeal, and which decision was approved of by a vast majority of the episcopal bench at that time. A question as to that decision was never raised; a doubt as to it was never expressed in any court of justice, or in any legal publication of weight or authority. It was hardly questioned at the time, except, indeed, in one or two pamphlets, the arguments of which were destroyed by a reverend individual now on the bench.\* That decision was acquiesced in by the universal assent of the whole profession of the law; it has now been in print for thirty years; but it has never been questioned. It is undoubtedly a single decision, and therefore the same Court may review or reverse it; but as it is a decision which has stood the test and examination of time, without any serious objection being made to it—certainly without any doubt being expressed by any legal tribunal—we rely on it as an authority of no small weight, till it is shown on the other side that that judgment was wrong.

It is said that the whole Dissenting population, baptized by their own ministers, are to be considered unbaptized. Was that contemplated by the legislature of the country? The necessity of clerical baptism was not introduced at the time of the Hampton Court Conference, or at the time the canons were made, or at the time of the Articles; and the word unbaptized was never introduced into the rubric till 1661. But have not the legislature themselves imposed a stamp duty upon the baptismal registers of Dissenters? Dr. Phillimore was at the head of a commission, emanating from the crown, which some time since recommended that registers of Dissenters should be received in evidence, under certain restrictions. That recommendation was adopted by the legislature in the last session of parliament, and is now the law of the land; and yet it is said, that unbaptized signifies those persons who have not received baptism at the hands of ministers of the Church of England. Is

\* Dr. Nicholl was supposed to refer to an article on Archdeacon Daubeney's pamphlet in the *Quarterly Review* for 1812.

it meant to be said, they are so far unbaptized that they must be re-baptized ? Can any number of instances be produced where persons who have been baptized by Dissenters, have become members of the Church of England,—have been admitted to the priesthood, and advanced to the bench : can any number of instances be produced of such persons being re-baptized ? Were Bishop Butler and Archbishop Secker, two great ornaments of the bench, ever re-baptized ? It is, therefore, monstrous to contend that such is the practice.

It is admitted that up to 1604 lay baptism was legal. We say that up to 1661 no doubt can be entertained on the subject ; because, up to that time, there were no legal means ever taken to alter the law ; the question regards not ceremonies, but the law, and that could only be altered by an act of parliament. In this case issue has not been taken originally on the law, but the articles pleading the law and facts have been allowed to go to proof, and after witnesses have been examined, an allegation is brought in, denying, not the facts, but the law. This is a very unusual proceeding. If hereafter any proofs of what is said on the other side to have been the practice of the Church of England are brought forward, we undertake to prove, from contemporaneous history, that the practice of the Church of England has been different, up to 1712, when there was an unanimous decision of the bench of bishops, admitting the validity of lay baptism. The Church of England says, that the laity who baptize are liable to be punished, except in case of extreme necessity. Like irregular marriages, *quod fieri non debet, factum valet.* A baptism of this kind is not more invalid than was a clandestine marriage, before the Marriage Act, celebrated without the usual banns.

Then as to the second article of the allegation. Do the Dissenters claim to exercise the functions of a lawful bishop, priest, or deacon of the united Church of England and Ireland ? They repudiate such a notion. In the preface to Edward the Sixth's Ordinal, in 1552, the same words are used, and if these words are to invalidate lay baptism at this time, they would equally invalidate it when the adverse plea admits lay baptism was valid. The preface to the Ordinal of Edward VI., in 1552, says, " It is evident to all men, that, from the Apostles' time, there have been in

“ Christ’s Church Bishops, Priests, and Deacons, &c.” Then if these words in the rubric of 1661 are to render laymen incompetent to perform the office,—if baptism celebrated by them is to be invalid,—this preface of Edward VI. would equally render lay baptism invalid. Therefore, it is submitted, the second article is entirely immaterial.

The third article pleads, that Mr. Balley being unordained, the baptism is null. Unless the Court is prepared to reverse the decision in the case of *Kemp v. Wickes*, it cannot receive this article.

The next article states, that from and after the Conferences holden at Hampton Court, in 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives, under licence from the Bishop of the diocese, and which practice had up to that period been tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm assembled at the said Conferences, and in order to give effect to such repudiation King James I. directed an alteration to be made accordingly in the Liturgy of the Church of England, and from that period the Liturgy has not allowed the rite of baptism performed by unordained persons to be valid, but has held the contrary. Was it necessary, then, in order to baptize, to have a licence from the diocesan? Look at the constitutions of Othobon and Peccham, which require ministers to instruct their people as to the form of baptism, that they may themselves baptize. As to the latter part of the article, that from the time of James I. the Church of England had held the direct contrary of tolerating the performance of the rite of baptism by unordained persons, it is an entire misrepresentation. At the Hampton Court Conference, King James said, “Though the minister “is not of the essence of baptism, he is of the essence of the right “performance of it.” That is the right distinction. It is an irregular baptism, if not performed by a lawful minister, but it is not invalid. King James goes on to say, “I utterly dislike re-baptization.” Accordingly it was agreed that the rubric should be altered, so as not to appear to sanction or encourage baptism except by lawful ministers; but the Court will find that there is not a single word of negative in that rubric.

The fifth article pleads the rubric in the Liturgy, "imprinted by the deputies of Christopher Barber, printer to the Queen's most excellent Majesty, A. D. 1595."

The sixth article pleads the rubric of 1606.

The Hampton Court Conferences were held in the years 1603-4. The canons were passed in a convocation on the 18th March, and if the rubric was not altered till 1606, the canons all apply to the rubric before. It is a striking fact, that Bishop Bancroft, who was present at the Hampton Court Conference, and who maintained the validity of lay baptism, was promoted by James I. to be Archbishop of Canterbury, within three months from the time of the Conference.\* Mr. Bingham further mentions, that James I. did not understand the rubric passed at Hampton Court as annulling lay baptism.

The seventh article pleads, that in the rubric of the Book of Common Prayer, which is a part and parcel of the statute 13th and 14th Car. 2, c. 4, in the order for burial of the dead, it is enjoined that such office is not to be used for any that die unbaptized, or excommunicated, or have laid violent hands upon themselves. This rubric was not in the Liturgy till 1661, and therefore the canon which was made in 1603, and the Hampton Court Conferences, could not have referred to it.

The next article pleads the canons, and there is a short and simple answer to that. It has never been questioned that these canons have not been confirmed by act of parliament, and therefore are not *proprio vigore*, binding upon the laity. Now the common law of England knows of no prosecution for religious opinions. For reviling the Christian religion, persons have been punished; but bare non-conformity is not punishable by the common law, and by the Act of Toleration Dissenters are exempted from all ecclesiastical censures. Assuming that the canons of 1603 were declaratory of the law as at that time existing, they were not declaratory of the common law, but of the statute of Elizabeth, and the other statutes against non-conformity which have been repealed by the Statute of Toleration, and therefore they fall to the ground, with all the statutes which were repealed by the Statute of Toleration. Those canons only remain in force which are not repugnant to the laws, statutes, usages, or customs of this country.

\* Bingham's Schol. Hist. c. 3, s. 5; Works, 8vo. vol. viii. p. 121, Ed. 1839.

Is it meant to plead that persons irregularly baptized are *ipso facto* excommunicated? Is it meant to be said that a child is excommunicated because he is a non-conformist? If that be not meant, the child in this case is not brought within the words of the canon, nor even if she is excommunicated, because she has not been *denounced* excommunicated. The canonists are unanimous in requiring a declaratory sentence where a person is excommunicated.

These canons then cannot affect the question, because, first, they are contrary to the law of the land, and therefore are not existing, even if they had been of binding validity at first. And, secondly, if they are binding, they do not affect this question, because unless the party was denounced excommunicated, excommunication would not exclude him from burial.

A minister performing a clandestine marriage is *ipso facto* excommunicated; but was it ever held that because the person celebrating such marriages was excommunicated, that therefore the marriage was invalid? or was a question ever raised as to the validity of marriages celebrated by such a person?

In the ninth and tenth articles of the allegation are set forth the 23rd and 25th Articles of the Church of England. When were they passed? Did they, previous to the Conference at Hampton Court, prohibit lay baptism? No; it was valid up to 1604. How, then, can these articles affect a question of lay baptism?

The remaining article, respecting the doctrines of the Wesleyan Methodists, has already been discussed. In the first place, the Court has nothing to do with this subject; and, in the next, the defendant has totally mistaken the object and purport of our plea. We plead, merely, that the baptism was, in fact, solemnized according to the orthodox form, namely, with water, and in the name of the Holy Trinity;—we have pleaded that that is the form which the Wesleyan Methodists, in all instances, commonly and generally receive and observe;—and we have further pleaded that, in this particular instance, the baptism was celebrated by a minister, preacher, or teacher of the Wesleyan Methodists.

On these grounds, it is submitted, that the Court cannot admit any part of this allegation.

Dr. *Phillimore*, on behalf of the Rev. T. S. Escott, and in support of the admissibility of the allegation.—I shall not attempt to go

into the theological disquisition of my learned friend, Dr. Nicholl, or my speech might not be brought to a close during the present term. Neither is it by any means my intention to state that all Dissenters are to be considered as unbaptized. I shall not advert to Otho and the other authorities cited by my learned friend who last addressed the Court, because I think the points argued by the two counsel who preceded Dr. Nicholl ought principally to be answered. I am counsel here for a Minister of the Church of England, who has to answer an offence of a very grave nature. If the articles exhibited against the Rev. Mr. Escott were established, he might be condemned to suspension for three months,—and, if persisted in, to deprivation. This is a situation by no means very pleasant to be placed in. It is the duty, therefore, of the counsel of such a party, to give what they consider the best advice to a person so charged, in order that he may successfully defend himself. The Court, too, will, under such circumstances, give the party accused the utmost latitude of defence. My learned friend, who last addressed the Court, in reference to the judgment in the case of Kemp v. Wickes, said that a vast majority of the Bishops had acquiesced in that judgment; but I find that that decision has been objected to by some eminent persons. I find from Mant's Common Prayer, issued from Lambeth Palace itself, a doctrine laid down, which was the very reverse of that propounded in Kemp v. Wickes, viz., that baptism, even in cases of necessity, by a lay or unordained person, was null and void, and that "it would be better to omit the rite altogether, and to leave the child to the uncovenanted mercy of God," rather than the ceremony should be performed by those not duly qualified. The proceeding against the reverend gentleman for whom I appear, is grounded on the 68th canon, which relates to ministers refusing to bury; and is it justice to the party so accused, that he should be prohibited from referring to the contents of the other canons of the Church to show that he had not acted in disobedience of the regulations by which the Established Church was governed? The whole of the canons ought to be taken in *pari materia*, by which a clergyman was forbidden to bury an unbaptized person. He is bound to obey all the canons. His ordination oath bound him to obey them, and it is not to be trifled with. And it should be remembered that this proceeding against Mr. Escott does not rest on the law of the land, but is grounded on the

canons. It ought not to be forgotten, that at the time the Conference at Hampton Court was held, there were not any Dissenters in existence, but there were Non-Conformists, and under the canons a clergyman could not be compelled to bury a person living in schism. In the proceedings that had been taken, my learned friend Dr. Harding, and I, have advised our client in the best way we could. If the Court were to hold an opinion in favour of the judgment of Sir John Nicholl, in the case of *Kemp v. Wickes*, and we advise the Rev. Mr. Escott to follow the same course as was adopted in that cause, there would have been an end of the present case. We contend, that a Wesleyan minister has no right to baptize. The judgment in the case of *Kemp v. Wickes* is a single decision upon a vast and important question, affecting the conscientious feelings of a large proportion of the clergymen of the Church of England. Indeed the question is so important that it might be advisable to take the opinion of a superior court upon it.

Sir HERBERT JENNER.—It will be useful to do so.

Dr. *Phillimore*.—It will then be necessary that the Court should have all the information upon the subject that was possible. I contend that it was never intended by the 68th canon, to compel a clergyman to bury the body of a person that had not been duly baptized. It is part of our case to contend that the baptism by a Wesleyan Minister is not held a valid baptism. At the opening of the Conference, King James expressed himself against baptism by laymen and women.

The *Queen's Advocate*.—And James also declared against re-baptism.

Dr. *Phillimore*.—I am ready to argue to the fullest extent also against the principle of re-baptism.

Sir HERBERT JENNER.—Were not ministers before 1603 compelled to bury a person not regularly baptized?

Dr. *Phillimore*.—I think not. I am exceedingly sorry that the question in the present case has been raised at all. I think, however, that a subject like the present should be argued with temper, and I shall endeavour to consider the question with calmness. It is the duty of the clergyman to ask “ by whom was the child baptized?”

Sir HERBERT JENNER.—You are going into the main question. How am I to decide the point now before me?

**Dr. Phillimore.**—I wish to show that the allegation is admissible. That is the question before the Court.

**Sir HERBERT JENNER.**—If in 1603 the Church tolerated lay-baptism, can you show any prohibition since?

**Dr. Phillimore.**—I think by the rubric.

**Sir HERBERT JENNER.**—Is it, or is it not, prohibited?

**Dr. Phillimore.**—In 1575, in Elizabeth's time, there was a canon directly against it.

**Dr. Nicholl.**—Not a printed or published canon.

**Sir HERBERT JENNER.**—Does Mr. Balley claim to be of the Church of England?

**Dr. Phillimore.**—No; we claim to be of the Church of England, and we get our authority to act from the canons of that Church. A plea of the nature now offered, though not frequent, is not at variance with the practice of the Court. The question is, will the Court compel a clergyman of the Established Church to bury a corpse under such circumstances as are stated in the present case? My learned friend has alluded to my having been appointed on a commission emanating from the crown, and I am happy to state that an act founded on the report of that commission was last year passed by parliament, but that had no reference to the present question. The Dissenters have the privilege of burying in their own cemeteries. I contend, that none but baptized persons are entitled to interment in church-yards, and that no one can validly perform the rite of baptism who is not validly ordained.

**Sir HERBERT JENNER.**—Do you hold then that baptism by a Roman Catholic Priest is a valid baptism?

**Dr. Phillimore.**—I should think so. That, at least, is my private opinion. A Roman Catholic Priest would not require re-ordination.

**Sir HERBERT JENNER.**—Then you think that a baptism by a Roman Catholic Priest would intitle a person to be considered as admitted into the body of the Church?

**Dr. Phillimore.**—I should think so. That is my opinion. A Roman Catholic Clergyman is an ordained Minister.

**Sir HERBERT JENNER.**—Is he a “lawful Minister” according to the rubric; and if he baptized a child, would the child be received into the body of the Church?

**Dr. Phillimore.**—I think so.

Sir HERBERT JENNER.—Would he be a “lawful Minister” within the meaning of the rubric?

Dr. *Phillimore*.—I think so, in the eye of the law.

The *Queen's Advocate*.—Part of the words of the service are these “Then let the *lawful Minister*” do so and so. Would that apply to a Roman Catholic?

Sir HERBERT JENNER.—Would he be so in the eye of the law?

Dr. *Phillimore*.—I think so. James would have held him to be a lawful minister. I admit that the 11th article may be too long. The words of Wesley himself show that the ministers are prohibited from exercising the rite of baptism. We say that the Wesleyan Ministers are prohibited from exercising the rite of baptism,—that if they do so, it is a violation of the decrees of their founder,—that if they do so, it is a recantation of their adhesion to the Wesleyan Community,—and that the baptism in this case is not valid. We have advised our client in the best way we can. He has the chance of being disgraced, and he has a right to full latitude in defending himself. It is said on the other side, that the rite was performed according to the forms observed by the Wesleyan Methodists. We attempt to show that their ministers are prohibited from baptizing, and if they do administer that rite, it is in violation of the injunctions of their founder. The Court, under the circumstances, will, I trust, admit the plea offered by the party proceeded against.

Dr. *Harding*, on the same side.—The learned counsel on the other side have charged us with having lost our way. If so, we have to blame the other side for it. As counsel for the party proceeded against, we are ready to contend, that the baptism was not according to the rites of the Church of England. They say that it was performed by a minister of the Wesleyan community; and we then say that the person who so baptized had no power to do so. I contend, that the passing of the Toleration Act did not give such latitude to Wesleyans as is contended for. If they claimed to be considered as a part of the Church, how could they also claim the benefit of the Toleration Act? The question whether Wesleyan Ministers were or were not to have the power of administering the rite of baptism, was most important. Some of the Wesleyans boast of their being of the Church, and it is very material to know whether they are or are not, for if they are they have no right to baptize. Counsel on the other side had pleaded in their articles,

that the baptism was performed by a minister, preacher, or teacher ; and now they seem inclined to throw that overboard, and deal with it as a case of lay-baptism. Wesley, in the first instance, departed from the Church, and the Wesleyans will now find it necessary to depart from him. This is the tendency of all schism, to set the disciple above his master, and the servant above his lord. They have pleaded that one of their ministers baptized the child in the present case. We plead that they have no right to do so. We set out the doctrines of Wesley, in which it is declared, that for any one of that body to administer the Sacrament would amount to a recantation of Methodism. If the Court has any doubt upon the subject of admitting the responsive plea, the benefit of that doubt will be given to the defendant. A party cited criminally is entitled to plead fully what he considers necessary for his defence. That has hitherto been the practice of the Court, and I trust that in this case the rule will not be departed from.

Sir HERBERT JENNER.—The Court feels great difficulty in dealing with this allegation, as the whole of it except the 11th article might have been brought forward in argument against the admission of the articles, when the question of law might have been discussed as in the case of *Kemp v. Wickes*. If the allegation were rejected, the question would not be decided ; indeed, it would be presumption in the Court to decide the question at the present stage of the proceedings. If the whole were admitted, the Court must go into an examination of the Minutes of Conversations, and the 115 Sermons of Mr. Wesley, referred to in the 11th article, and no possible good to the defendant can arise from the admission of that article ; since whether Wesleyan ministers had Mr. Wesley's authority to baptize or not, they could not be brought below the rank of laymen, and the question of the validity of lay-baptism would be the real question for the Court to decide. I put it to the counsel for the defendant, whether any benefit can arise from admitting the 11th article.

Dr. *Phillimore* intimated that they would willingly abide by the decision of the Court.

Sir HERBERT JENNER.—I do not find the fact of baptism as pleaded in the articles denied by the defendant. The whole of the allegation is not perhaps admissible, but I will not take upon myself the responsibility of reforming it. But as the first ten articles,

though unnecessary, will not lead to any great expense, I am inclined to admit them, though not the 11th. I purposely abstain from giving any opinion on the law of the case at present.

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The Proctor, for Mr. Mastin, having "admitted that Elisha Balley, mentioned in the 10th article of the allegation, never had received Episcopal Ordination or Consecration, and was and is not a lawful minister of the Church of England," no further proof was taken upon the allegation, and the cause came on for argument on the first session of Hilary Term 1841.

The Queen's Advocate was about to open the case on the part of Mr. Mastin, but was interrupted by Dr. Phillimore, stating that he had an objection to take to the proceedings.

*Dr. Phillimore.*—In this case I entertain, from the perusal of the evidence, a strong opinion that the promoter of this suit has no *persona standi* in Court. Therefore I mean to take an objection to the proceedings, either now or when my learned friend has stated his case. The question arises on the competency of the promoter.

*The Queen's Advocate.*—I am taken by surprise. I think my learned friend should state his objection at once.

*Dr. Phillimore.*—The question arises upon answers to interrogatories given in the depositions. The suit is promoted by a person named Mastin. If the Court will look at the evidence of Sarah Cliff, the mother of the child, it will find that in answer to the last interrogatory, she says: "Mr. Mastin, the promoter of the office of the judge, is a farmer and grazier. He lives and has a farm at Gedney. He is a class-teacher among the Wesleyans. I am a member of his class." The husband, Thomas Cliff, says, "Mr. Mastin has a nice little farm. He is a farmer and grazier, but in a large way of business. He bears the office of a class-leader in the Wesleyan body. He has conversed with me at divers times on the subject of this case. I have heard him say, if it went against him, the expenses, he expected, would fall on himself." The Court sees that the promoter of this suit is a person living in schism—a class-teacher among the Wesleyans, and a member of that body.

This is a proceeding under the Code of Canons of 1603, under

one of the canons in that code, which has for its peculiar object the conformity of all persons to the Established Church. I shall now direct the attention of the Court, that it may understand the nature of the objection I am about to take, to two of those canons, the ninth and the twelfth. The ninth canon says:

“ Whosoever shall hereafter separate themselves from the  
 “ communion of saints, as it is approved by the apostolic  
 “ rulers in the Church of England, and combine themselves  
 “ together in a new brotherhood, accompting the Christians  
 “ who are conformable to the doctrine, government, rites  
 “ and ceremonies of the Church of England, to be profane  
 “ and unmeet for them to join with in Christian profession,  
 “ let them be excommunicated *ipso facto*, and not restored  
 “ but by the archbishop after their repentance and public  
 “ recantation of such their wicked errors.”

The twelfth canon says:

“ Whosoever shall hereafter affirm that it is lawful for any sort  
 “ of ministers and lay persons, or either of them, to join  
 “ together and make rules, orders, or constitutions in  
 “ causes ecclesiastical, without the king's authority, and  
 “ shall submit themselves to be ruled and governed by  
 “ them, let them be excommunicated *ipso facto*, and not  
 “ be restored until they repent and publicly revoke those  
 “ their wicked and anabaptistical errors.”

Now comes the point to which I call the immediate attention of the Court. It arises on the answers of two of the witnesses in the case. The first witness to whom I shall call your attention is the person who designates himself the Rev. Robert Bond. In his answer to the fourteenth interrogatory, he says: “ Bearing in mind “ the evidence I have already given in this case, and the oath I “ have taken, I do admit the Wesleyans, in fact, as a body, affirm “ that it is lawful for ministers and lay persons to join together, and “ make rules, orders, and constitutions, in causes ecclesiastical, “ without the king's authority, and submit themselves to be ruled “ and governed thereby.” Mr. Overton, in answer to the same “ interrogatory, says, “ Bearing in mind the evidence I have already “ given in this case, and the oath I have taken, I do admit that the “ Wesleyans in fact, as a body, affirm that it is lawful for ministers “ and lay persons to join together, and make rules, orders, and con-

“ stitutions, in causes ecclesiastical, without the king's authority, “ and submit themselves to be ruled and governed thereby.”

I ought to have observed, when mentioning the canons, that one of the Thirty-nine Articles—the thirty-third—is to this effect :

“ Of excommunicate persons, how they are to be avoided.

“ That person which by open denunciation of the church “ is rightly cut off from the unity of the church, and ex- “ communicated, ought to be taken of the whole multitude “ of the faithful, as an heathen and publican, until he be “ openly reconciled by penance, and received into the “ church by a judge that hath authority thereunto.”

The Court will perceive the whole of my argument is this : that the person who promotes this cause has been guilty of a capital offence under the canons of 1603. He has been one of a party denying the supremacy of the Queen, who is the head of the church. I think it is a novel case.

Sir HERBERT JENNER.—Is this the time at which the objection ought to be taken ?

Dr. Phillimore.—The objection could not have been taken at an earlier period than the present.

Sir HERBERT JENNER.—Your argument is that the Wesleyan ministers are Dissenters, and so in schism ?

Dr. Phillimore.—It becomes a very serious question, whether the Court will allow its office to be promoted against a clergyman of the Established Church for a violation of one canon, the persons who promote the suit being violators of another.

Sir HERBERT JENNER.—Is the party promoting the office of the judge in this case *ipso facto* excommunicated under the canon you have mentioned ?

Dr. Phillimore.—Clearly so.

Sir HERBERT JENNER.—Has there been any sentence of excommunication ?

Dr. Phillimore.—No : nor do I consider it necessary.

Sir HERBERT JENNER.—Has there ever been a case in which persons were held to be excommunicated in law, unless under a formal sentence ?

Dr. Phillimore.—Yes. The case of Scrimshire v. Scrimshire.\* In that case Sir Edward Simpson said : “ In our courts it is not “ thought necessary to have a declaratory sentence of an excom-

\* Haggard's Consistory Reports, vol. ii. p. 399.

“munication *ipso facto*.” The punishment arises from the fact of these persons being proclaimed by the canons to be in a state of schism, and having no *persona standi*. No one can say these parties are not violating the canons, and denying the Queen’s supremacy. And can they proceed in the Ecclesiastical Court? Could a Jew or a Quaker promote the office of the judge? I imagine not. The Court would refuse them. The Court has inquired why we did not take the objection in another form. We had no idea of it. The utmost stretch of my imagination could not have led me to think that persons in such a situation would have come forward in this way. I never heard of a case in which such an objection could arise before. The objection to going on in the case altogether, if it arise out of the evidence, is taken at the opening of the case. It seems to me to be fatal. Can my learned friends show that the Court has allowed a Nonconformist so to proceed under the ecclesiastical laws, who belongs to a separate body who deny the validity of those laws? The objection ought to be taken; and I feel a difficulty in imagining how the Court can dispose of it, otherwise than in our favour.

Dr. Harding.—This is a criminal suit; and by the analogy of practice in all other criminal courts, the proper time for taking an objection as to a civil disability of the prosecutor is this. We are here on behalf of a gentleman against whom the office of the judge is promoted criminally; and I hope the Court will not think that we take our objection at an improper time.

It is suggested that a sentence of excommunication is necessary. The question then is, how can we show the Court that the promoter in this suit is excommunicated? Our answer, with great deference to the Court, is, that by the Canon Law, as administered in this country from the earliest times, two kinds of excommunication are admitted,—the one *ab homine*, and the other *de jure*. I do not think I can cite a higher authority than Ayliffe, who says, (Parergon, p. 156,) “An ecclesiastical censure is two-fold; the one inflicted by law, the other inflicted by man. A censure inflicted by law, is said to be that which is pronounced by the legislator, with an intent of making a law or general statute perpetual; and is *ipso jure* inflicted on transgressors thereof by way of punishment. But a censure *ab homine* is said to be that which is pronounced by some judge, or superior, commanding something, not with a design of

making a law or statute perpetual, but with a purpose of enacting some temporal and transitory precept; and is inflicted on the consummaceous and disobedient offenders.

“ But touching a censure of excommunication . . . there is one species which is called a censure *latæ sententiæ*, and another *sententiæ ferendæ*. The first is said to be that which is incurred *ipso facto* without any other sentence of the judge. But a censure *sententiæ ferendæ* is said to be only that which savours of combination, and is not *ipso facto* incurred before the judge's sentence. Now a censure *latæ sententiæ* may be known by the following rules, *viz.* First, when these particles or words are put in the law, “ as *ipso facto*, *ipso jure*, or *latæ sententiæ*. 2. When adverbs are “ put in and go along with the censure, &c. &c.”

The Court will find this is the doctrine recognised by all the canonists. It is distinctly recognised by Lord Coke.\* With respect to the words *ipso facto*, and the remark that persons cannot be excommunicated without actual sentence, I beg to submit that the Courts of Law have already decided upon the legal effect and meaning of these words, when they occur in statutes. In the case of *Baker v. Brent and Robinson* (Croke, Elizabeth, 680,) it was held, that an incumbent who neglected to read the articles on his induction according to the statute, had voided the Church *ipso facto*, and there needed not any sentence of deprivation. And in *Scrimshire v. Scrimshire* it is said, “ Persons present at such marriages are excommunicated *ipso facto*,” &c. I think my learned friends will have some difficulty in showing the Court that these passages are not exactly in point.

I have attempted to show the Court, that two kinds of excommunication were well known to the Canon Law in the earliest times; and I have shown that Lord Coke confirms this. With respect to *ipso facto* excommunication, I have attempted to show that the Courts of Common Law have already put a construction upon these words when occurring in statutes;—and I have shown, from *Scrimshire v. Scrimshire*, that it is not necessary to have a declaratory sentence of *ipso facto* excommunication.

This is a criminal proceeding, in an ecclesiastical Court, under one of the canons. Now I think, on looking at the origin, nature,

\* *Excommunicatio est nihil aliud quam censura à canone vel judice ecclesiastico prolatæ et inficta, privans legitimam communione sacramentorum et quandoque hominum.* 1 Inst. 133 b.

and constitution of those canons, the Court will see a great difficulty in the case. Before the Reformation, no one excommunicated *ipso facto* could be a suitor in this Court. The judge is the official of the bishop; the judge is in the place of the bishop; and how can a person who admits himself to be by a canon declared excommunicate *ipso facto*, be allowed to promote the office of the judge, in a criminal suit, in an ecclesiastical Court? But has anything occurred affecting the constitution, or the jurisdiction, or the mode of proceeding of this Court, since the Reformation? Till I hear my learned friends, I am unable to discover that there has.

In the next place, I think we have good ground for contending that a party cannot come into this Court and promote the office of the judge against a clergyman under a particular canon. The only offence Mr. Escott is charged with having committed, is an offence against a particular canon. My learned friends, then, must satisfy the Court that a party can come here, and promote the office of the judge against a clergyman offending against a particular canon,—when the person promoting the office admits that he is excommunicated *ipso facto*. I think this is contrary to the practice of all other Courts. These canons must be read as one statute;—these separate canons are so many different clauses;—it is impossible, therefore, for a party to contend that he can attempt to enforce a canon against Mr. Escott, when he himself is labouring under a disability by one of those very canons.

It may be objected that the canons do not bind the laity. In the case of *Middleton v. Croft*, it was decided that the laity are bound by canons declaratory of the ancient canon law.\* These canons are merely declaratory of the ancient canon law, that persons dissenting from the church are in a state of schism. To any cases or statutes which my learned friends may cite, we shall have an opportunity of replying. I trust the Court, after having heard what my

\* In this case, Lord Hardwicke, C. J., said, "Upon the best consideration we have been able to give it, we are all of opinion, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an 'obligation antecedent to, and not arising from this body of canons.'—2 Atkyns' Rep. 653. (Ed. 1794.)

learned friends say by way of answer, will pronounce in favour of the validity of this objection.

The *Queen's Advocate*.—I am not a little surprised at the objection taken by my learned friends ; and I think it would have been rather more fair and candid on their part, though we have no right to insist upon such a proceeding, if they had stated beforehand their intention to take such an objection. However, I must consider the objection as now taken by them, and deal with it as well as I can upon the spur of the moment. After having heard and attentively considered the observations which have been offered, it does not appear to me that the objection of my learned friends rests on any solid foundation. What is the objection that has been taken ? They have in the first place referred the Court to the evidence of Sarah Cliff, and of her husband, to show that Mr. Mastin, the promoter of this suit, is a class teacher among the Wesleyan Methodists, and then to the evidence of Mr. Bond, to show that he holds tenets which my learned friends say are inconsistent with some of the canons under which Mr. Mastin is proceeding to promote the office of the judge. Now be it so, as to the Rev. Mr. Bond. I put it for the sake of argument. Is there anything in this case to show that Mr. Mastin holds those tenets ? All that is shown here is, that Mr. Mastin is a Wesleyan class-teacher ; and is the Court from this to be led to the conclusion that he holds any particular doctrines which render him liable to be legally considered as *ipso facto* excommunicated ? Can the Court hold that every person who is a Wesleyan is *ipso facto* excommunicated—that he is to be treated as a heathen—to be driven out of the pale of Christianity ?

Dr. *Phillimore*.—I did not say so myself. It is the provision of the statute.

The *Queen's Advocate*.—You say the statute says so ; that he is by the law of the land *ipso facto* excommunicated. I have therefore not unfairly represented what fell from my learned friend. If the law be correctly stated, it is frightful to contemplate the extent to which this doctrine would go. It would not only go to hold that this Mr. Mastin is *ipso facto* excommunicated, and to be treated as a heathen ; but that every Wesleyan in the kingdom is to be treated in the same way ; nay, that every Calvinist, every Dissenter in the kingdom, every one of her Majesty's subjects who does not conform to the ritual of the Church of England, is excommunicated. I say

this is a position which no court would be inclined to admit. The Wesleyan Dissenters, if Dissenters they are to be called, (for I apprehend that though the Wesleyans may dissent from the *discipline* of the church, they do not dissent from its religious *tenets*,) conform more nearly to the Church of England than any other body of Dissenters, if Dissenters they can be called. But let us see what the argument of my learned friends is. Why that this Mr. Mastin is, under one of these canons, excommunicated *ipso facto*, and therefore cannot be allowed to promote the office of the judge under the authority of another of these same canons. I would ask my learned friends whether they ever heard of a Toleration Act in this country? and whether that act does not relieve those who dissent from the church from those pains and penalties which are inflicted by the canons? Let my learned friends consider those statutes, from the first which was passed in the reign of William III., to the latest and most important act, the 53d Geo. III. c. 127. My learned friends seem to think there is a great inconsistency in allowing a man to promote the office of the judge under one canon, when he has not conformed to another, but has acted in direct disobedience to it. But if, by the statute I have just referred to, and the other acts of toleration, he is relieved from the pains and penalties of these canons, I do not see how he is to be deprived of any benefits he may derive from existing canons. It does not follow, because he is relieved from the pains and penalties of some canons, that he may not take advantage of and proceed under others. The circumstance of the penalties being taken away does not deprive Dissenters of liberty to take advantage of and proceed under the canons. The effect of my learned friends' objection would come to this: that no Dissenter could proceed under a canon of the church. So that, though the Ecclesiastical Court is the only Court that can take cognizance of offences of this kind, committed against Dissenters, the doors of justice are to be closed against them, and they are not to be at liberty to sue in this Court—the only Court in which they can sue, and thus to be deprived of all remedy. From the acts of toleration it is quite clear that Mr. Mastin is relieved from those pains and penalties to which he possibly might have been subject, had these canons been in force; though I cannot agree with my learned friends that these canons of 1603 can be binding upon the laity, unless so far as they are in conformity with the law of the land.

Dr. Nicholl here read the following extracts from the act 53d Geo. III. c. 127.

“ Whereas it is expedient that excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued . . . . . be it therefore enacted . . . . . that from and after the passing of this act, excommunication, together with all proceedings following thereupon, shall in all cases, save those hereafter to be specified, be discontinued throughout England . . . . . Provided always (sec. 3), that no person who shall be so pronounced or declared excommunicate, (as the second section enacts) shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment . . . . . as the Court pronouncing or declaring such person excommunicate shall direct.”

The *Queen's Advocate*.—In Dr. Watson's “Clergyman's Law,” there is mention made of the statute 5th and 6th Edw. VI. against smiting in church, the punishment provided for which is *ipso facto* excommunication.

The note says, “Although this statute doth say that he who smites another, &c. shall be deemed excommunicate *ipso facto*, &c., yet there ought to be a declaration in the Ecclesiastical Court of the excommunication, otherwise a person excommunicated for an offence against this statute could not be absolved from such excommunication, nor receive absolution from the ordinary. Pasch. 4 Car. C. B. Viner v. Eaton, Hetley, 86. Also he that smites another, doth not stand excommunicate until he be convicted thereof at law, and this transmitted to the ordinary. Trin. 23 Car. 2, Dyer v. East, 1 Ventris, 246.” (Watson's Clergyman's Law, p. 647, ed. 1712, 8vo.)

Sir HERBERT JENNER.—(To Dr. Phillimore.)—What do you say to the provisions of the statutes which have been quoted?

Dr. Phillimore.—I say the statute of Geo. III. does not apply to cases of this description. It says excommunication is to be discontinued, except in certain cases. This is not a case to which it was intended to apply. My learned friend has cited the authority of Ayliffe, to show the different sorts of excommunication.

Sir HERBERT JENNER.—I shall hear you on that point presently. I wish to hear you with respect to this statute, which directs that all

proceedings against persons for excommunication shall be discontinued, except in certain cases, where excommunication is imposed as an ecclesiastical penalty; and that, when it is imposed as an ecclesiastical penalty, it shall not be followed by any civil disability or incapacity, except imprisonment.

Dr. *Phillimore*.—The question is, whether this act has any reference to the canons.

Sir HERBERT JENNER.—The question is, now, whether there is such a thing as excommunication.

Dr. *Phillimore*.—A person may be excommunicated *ipso facto*. I lay the greatest stress upon the second branch of my argument, that, putting aside the word excommunicated, it is not competent to this person to promote the office of the judge.

Sir HERBERT JENNER.—Is not that a civil disability? Could a person circumstanced as the promoter is, be a witness?

Dr. *Phillimore*.—I suppose he could. But he says, “I am violating these canons, and yet I will proceed under them.”

Sir HERBERT JENNER.—At present I have not come to that conclusion. You must get rid of this statute, and show that there is such a penalty as excommunication, followed, at this time, by civil disability.

Dr. *Phillimore*.—The words of the act are, that excommunication shall be “discontinued.” If the Court looks at the second section, it will find this provision:—“Provided, that nothing in this act shall prevent any Ecclesiastical Court from pronouncing or declaring persons to be excommunicate,” &c. I contend that it is impossible to say the ninth and twelfth canons are, by that act, excluded from effectual operation.

Dr. *Harding*.—The Court has a perfect right to call upon a party taking an objection to sustain a particular part of it; or to answer any particular part of the reply of my learned friends. I do not know, however, whether this course will save time ultimately. The Court calls upon us to get rid of the operation of a statute before we proceed further. I shall endeavour to do so in this way. The Court well knows that it is the general principle of all Courts, that a statute is only to be construed according to its whole object and purpose, which is generally found in its heading. What is the heading of this statute? “An Act for the better Regulation of Ecclesiastical Courts; and for the better Recovery of

“ Church Rates and Tithes.” And it begins—“ Whereas it is expedient that excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued, “ and that other proceedings should be substituted in lieu thereof,” &c. Therefore I apprehend what this act looked to, was excommunication in a suit or proceeding in this Court. It applied only to excommunication *ab homine*, and not *de jure*—to excommunication by the judge of this Court. The statute says, that excommunication shall be “ discontinued ;”—not that it shall be void, or at an end, but evidently referring to the pronouncing of the sentence of excommunication. It does not say it shall be at an end, or void ;—it merely says that this particular kind of proceeding shall be discontinued. “ And that in all cases which, by the laws of this realm, are cognizable in the Ecclesiastical Courts, no sentence of excommunication shall be given or pronounced,” &c. clearly showing the object of the statute. Then it proceeds to enact that, instead thereof, it shall be lawful for the judge to issue a writ *de contumace capiendo*. The statute also says,—“ Be it further enacted :—no person so pronounced and declared excommunicate shall incur any civil disability or incapacity.” We do not say that Mr. Mastin is a person so pronounced or declared excommunicate ; but that he is not. If we said so, we must show the sentence. We say he is *ipso facto* excommunicated under one canon, while he is proceeding against us under another:

Sir HERBERT JENNER.—I am clearly of opinion that this statute removes the process of excommunication completely ; and that a person excommunicated under this canon is relieved from all those civil disabilities to which he would before have been liable. And I am of opinion, that the discontinuing is not the mere discontinuing in a particular case, but the discontinuing altogether, except in those cases which are specially mentioned. I am of opinion that there is nothing in this objection to prevent Mr. Mastin from promoting the office of the judge in this Court. If these Wesleyans were, as a body, all excommunicated, where is the evidence that Mr. Mastin is a person of that description ? I am of opinion that under these statutes no civil disability attaches to Mr. Mastin ; and that he is therefore entitled to proceed in this cause in promoting the office of the judge.

The *Queen's Advocate* [opened the case on behalf of Mr. Mastin,

and having stated the proceedings and the contents of the articles and of the responsive allegation, continued.]—I shall now submit that the facts alleged in the articles given in on behalf of Mr. Mastin are duly proved ; that, when the law is considered, it will sufficiently appear that the Rev. Mr. Escott has been guilty of the offence imputed to him under the sixty-eighth canon ; and I shall therefore pray the Court to admonish him. The parties who promote this suit do not proceed vindictively. I do not mean to press for the punishment according to the canon ; but I shall pray the Court to admonish Mr. Escott, if it does not canonically punish him, and to condemn him in the costs.

*Dr. Phillimore.*—My learned friend has opened his case, and it is necessary that, in a very few words, I should open mine. My learned friend does not seem to have much confidence in his case, from the manner in which he concluded. He has pointed out to the Court the nature of this proceeding. The clergyman is articled against for a breach of the sixty-eighth canon, for having refused to bury the child of a Dissenter, leaving the Dissenters themselves to bury it in their own way, in the church-yard. Now on these proceedings, if my learned friend goes at all into the history of the rite of baptism, I shall contend that as far as Scripture is concerned, if we are to look to that, it confines the administration of baptism to the clergy, as much as any other function of the sacerdotal office. There is no more authority in Scripture for lay baptism, than for lay ordination, or absolution, or consecration of a church. During the time of Popery a different practice prevailed ; and in the earlier period of the Reformation doubts were entertained on the subject. But, after the Conferences which took place at Hampton Court, the point was settled to the exclusion of lay baptism ; and if any doubt then prevailed, it was settled by the proceedings which took place at the Restoration, and the Act of Uniformity. It is not the doctrine of the Church of England that baptism by a layman can be held to be a valid and legal baptism. On the other point, I shall, I trust, be able to satisfy the Court that the proceeding against a clergyman penalty, under this canon, by a person who has violated the canons in other respects, is not to be sustained in this Court. The clergyman himself, by the duty imposed upon him at his ordination, is bound not to acknowledge the baptism of any child by an unordained minister. The person who baptized in

this case was unordained. Mr. Escott refused to acknowledge the baptism ; and in this he was justified ; and both as to history and law, I believe I shall be able satisfactorily to prove my case, and I shall solicit the Court both to dismiss Mr. Escott, and to condemn the other party in costs.

*The Queen's Advocate.*—I have now to address the Court on behalf of Mr. Mastin, the promoter of the office of the judge ; and I can assure my learned friend he has not drawn a fair and legitimate conclusion from the observation I made, that I did not ask for the punishment of Mr. Escott according to the canon. My learned friend seems to think that observation arose from want of confidence in the case I have to support. I can assure him that it proceeded from no such motive. It was for the purpose of showing that which is the truth—that the party proceeding in this case entertains no vindictive feeling whatever against Mr. Escott. That was the sole reason for which I stated that I should not pray for the full extent of punishment the law justified me in asking. I do, with all humility, feel great confidence in the justice of this case ; and if I were not to do so, it would be extraordinary indeed, after the able judgment delivered in 1809, in the case of *Kemp v. Wickes*, and which has been acquiesced in, as far as I am aware, in all courts, from that time to the present. It would then be extraordinary if I did not entertain sanguine hopes of success.

This is a proceeding against the Rev. Thomas Sweet Escott, vicar of the parish of Gedney, for refusing to bury the corpse of Elizabeth Ann Cliff, the infant daughter of two of his parishioners, information having been given him beforehand of the time of the intended funeral, and information having likewise been conveyed to him that this child had been baptized by the Rev. Elisha Balley, a teacher or minister among the Wesleyan Methodists, according to the invariable form used by the Wesleyan Methodists, that is, with water, and in the name of the Father, the Son, and the Holy Ghost. Of the fact of this baptism Mr. Escott was duly informed, but he refused to bury the corpse, and assigned as his reason that the child had been baptized by a dissenting minister. I apprehend we shall have no dispute whatever as to the facts. I apprehend it to be quite clear that if these facts amount to an offence under the canons, Mr. Escott has been guilty of that offence ; and I shall therefore proceed to consider that which appears to me to be the

only matter that needs discussion before the Court—the point of law in the case.

Now I apprehend it will not be at all necessary for me—that it is not incumbent upon me—to enter into the Scripture doctrines to which my learned friend has alluded; namely, whether, according to the doctrines laid down in Scripture, the administration of the sacrament of baptism is confined entirely to those invested with the sacerdotal character. I apprehend it is not incumbent upon me to argue that general question, because I am relieved from that by the very plea given in on the other side. I should not be at all afraid to enter upon the general investigation of the subject; for I should be able to show that the Church, I might almost say in the primitive times, though that rests under a considerable degree of obscurity; but at all events, in very early times, did allow of lay baptism. From the general canon law of Europe, I should be able to show that the doctrine of the validity of lay baptism prevailed throughout Europe. From the legatine and provincial constitutions I should also be able to show that it was the doctrine of the Roman Catholic Church. The general canon law on the subject is collected by Bishop Gibson, and to be found in his Codex. The legatine and provincial constitutions are collected by Lyndwood. It appears to me that, from the plea of my learned friends, particularly the fourth article of the responsive allegation, it will be unnecessary for me to do more than advert to this earlier period of history; and that I may confine my argument to a much later time. To show the Court that I am justified in pursuing this course, I would beg to call its attention to the fourth article of the responsive allegation. That article pleads—

“ That from and after the Conferences holden at Hampton Court, in the year of our Lord 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives, under licence from the bishops of their respective dioceses, and which practice had been up to that period tolerated by the Reformed Church of England, was repudiated by the ecclesiastical authorities of this realm assembled at the said Conferences at Hampton Court as aforesaid; and in order to give effect and force to such repudiation, King James I. directed and caused an alteration to be

“ made accordingly in the Liturgy of the Church of Eng-  
“ land, and from that period to the present day the Liturgy  
“ of the Church of England has not allowed the rite of  
“ baptism, performed by unordained persons, to be valid,  
“ but has held the direct contrary.”

It is, therefore, admitted here in distinct terms, that down to 1603 the Church of England did consider lay baptism to be valid.

*Dr. Phillimore.*—It was “ tolerated.”

*The Queen's Advocate.*—Tolerated ; and therefore valid. They allow, then, that the practice of lay baptism prevailed in the Church of Rome, and that at and after the Reformation it was still tolerated down to 1603. If, then, it was tolerated till that time, I apprehend that it is not incumbent upon me to enter upon the argument as to the general law. It will be sufficient for me that this was the doctrine of the Church of England down to 1603, and that the same doctrine prevailed at a later period, and still continues.

The offence imputed to Mr. Escott is a transgression of the 68th canon, which is entitled, “ Ministers not to refuse to christen or bury.”

“ No minister shall refuse or delay to christen any child ac-  
“ cording to the form of the Book of Common Prayer, that  
“ is brought to the church to him upon Sundays or holy-  
“ days to be christened, or to bury any corpse that is  
“ brought to the church or churchyard, convenient warn-  
“ ing being given him thereof, before, in such manner and  
“ form as is prescribed in the said Book of Common  
“ Prayer. And if he shall refuse to christen the one or  
“ bury the other, (except the party deceased were de-  
“ nounced excommunicated *majori excommunicatione*, for  
“ some grievous and notorious crime, and no man able to  
“ testify of his repentance,) he shall be suspended by the  
“ bishop of the diocese from his ministry by the space of  
“ three months.”

So that by this canon a minister is not to refuse to bury the corpse of any person whatever, due warning being given to him, unless “ the party deceased were denounced excommunicated *majori ex-communicatione*, for some grievous and notorious crime, and no man able to testify of his repentance.” That cannot be held to be the case in this instance. It cannot be contended that this infant

had been pronounced guilty of any heinous offence—that she was denounced excommunicated—and no one was able to testify to her repentance. If it rested upon these canons, my learned friends would have no case.

But there is the rubric, which is part and parcel of an act of parliament, and upon this the main question in the case must arise. The rubric enjoins that the Burial Service “is not to be used for “any that die unbaptized, or excommunicate, or have laid violent “hands upon themselves.” Here two exceptions are added. The question, therefore, will turn very much upon the sense and meaning to be given to the word “unbaptized;” whether it means as, in the common and ordinary way of speaking, we should apprehend it would—persons unbaptized altogether; or whether, as it is incumbent on my learned friends to show, it applies to all persons not baptized by a lawful minister of the Church of England.

The other grounds mentioned in the rubric for justifying the refusal of burial, seem to warrant the belief that there was no intention to depart from the ordinary meaning of the term “unbaptized,” namely, that it meant unbaptized altogether. For with what is it put in company? *With those who are denounced excommunicate*,—who are excommunicated *majori excommunicatione*,—who are unchristianized altogether,—who are put out of the pale of christianity,—who are to be treated as heathen; and with those who “have laid violent hands upon themselves,”—who have died in the commission of a heinous offence, without an opportunity of repentance. Therefore taking the term “unbaptized,” *per se* and in its usual and ordinary sense, it must mean unbaptized altogether; or taking it in connection with the two other matters here joined with it in the rubric, *viz.* excommunicated persons and suicides, the fair construction of the word must be unbaptized altogether.

Now, it having been admitted that baptism by those who were not invested with the sacerdotal character, was tolerated down to 1603, it is a most material point in the discussion of the present question, to ascertain whether any alteration took place at that or any subsequent time. In order to see how the matter really stood, and to understand what occurred in 1603, when a material alteration undoubtedly did take place, it is necessary to go a little further back, and see what doctrine prevailed in the rituals shortly after the time of the Reformation.

In the reign of Edward VI., in 1549, and 1551 or 1552, alterations were made in the Liturgy with respect to baptism, and more especially as to private baptisms. It seems that, at that time, directions were given that children ought to be baptized at home, if they could not be brought to the church. The rubric of Edward VI., "Of them that be baptized in private houses in time of necessity" (as given by Dr. Cardwell, in his "Two Liturgies of Edward VI." p. 337), is this: "The pastors and curates shall oft admonish the people that they defer not the baptism of infants, &c.; and they shall also warn them," that is, the pastors and curates are to warn the people, "that without great cause and necessity *they baptize* not their children at home in their houses; and when great need shall compel *them* so to do, that then *they* minister it on this fashion;" that is, that the people minister it in this fashion: "First, let them that be present call upon God for his grace," not the pastor or minister, but them that be present, "and say the Lord's Prayer, if the time will suffer; and then one of them," not a word as to the pastor or minister, but one of the people, "shall name the child, and dip him in water, or pour water upon him, saying these words, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'" What follows is very remarkable, and leaves no doubt as to the doctrine of the Church of England at this time, with respect to lay baptism. "And let them not doubt but the child so baptized," i. e. baptized by a layman—by any one of them that were present,—"is lawfully and sufficiently baptized, and ought not to be baptized again in the Church." So that, though baptized by a layman, it is held to be lawful and sufficient baptism.

If the Church had intended to revoke this,—if it had intended so material an alteration as to say that baptism by a lay person was invalid, we should expect to find that alteration in express terms. But I defy my learned friends to point out any express alteration in this respect. I have shown that lay baptism was clearly held valid by the Church of England. "Let them not doubt," says the Church, "but the child so baptized is lawfully and sufficiently baptized." Unless I find an express revocation of this,—unless I find it laid down in express terms that an alteration has taken place,—I cannot come to the conclusion that such an alteration has been made.

Then the rubric goes on: "Yet, nevertheless, if the child, which

“ is after this sort baptized, do afterwards live, it is expedient that “ it be brought into the church, to the intent the priest may examine and try whether the child be lawfully baptized or no. And “ if those that bring any child to the church do answer that he is “ already baptized, then shall the priest examine them further,

“ By whom was this child baptized ?”

He is not to ask by what priest the baptism was performed, but merely to have evidence whether the child is really baptized or not. Then he is to ask,

“ Who was present when the child was baptized ?

“ Whether they called upon God for grace and succour in that “ necessity ?

“ With what thing or what matter they did baptize the child ?

“ With what words was the child baptized ?

“ Whether they think the child to be lawfully and perfectly “ baptized ?

“ And if the minister shall prove by the answers of such as “ brought the child, that all things were done as they ought to be ; “ then shall he not christen the child again, but shall receive him as “ one of the flock of the true christian people, saying thus,

“ I certify you that in this case ye have done well, and accord-

“ ing unto due order, concerning the baptizing of this “ child.”

Could anything more expressly signify not merely the toleration, but the approbation of the Church ? It appears to me that this is extremely strong evidence as to what were the doctrine and discipline of the Church at that time.

But at the conclusion of the form of baptism, as it was in 1551, it is said, “ But if they which bring the infants to the church do “ make an uncertain answer to the priest’s questions, and cannot “ tell what they thought, did, or said, in that great fear and trouble “ of mind (as oftentimes it chanceth) ; then let the priest baptize “ him in form above-written concerning public baptism, saving that “ at the dipping of the child in the font, he shall use this form of “ words : ‘ If thou be not baptized already, I baptize thee in the “ name of the Father, and of the Son, and of the Holy Ghost.’ ” This, again, clearly appears to apply to laymen ; for it cannot be supposed that a minister who was called in to baptize a child would be in such fear and trouble of mind, that he could not say whether

he had performed the ceremony rightly or wrongly. It cannot, therefore, have any other meaning than that the child was baptized by lay persons. This runs throughout the whole of the service of the years 1551 and 1552; contemplating the baptism of children in cases of necessity by laymen,—approving the doctrine, telling the people there could be no doubt a child so baptized was lawfully and sufficiently baptized. I apprehend nothing can be more strong as to what were the opinions and doctrines of the Church of England at this time.

The next alteration in the Liturgy was in the reign of Queen Elizabeth; but there was then no material alteration on this head. It stands almost verbatim as in the year 1551, and it is therefore unnecessary that I should trouble the court as to this.

But in the year 1575, it does appear there were some articles which passed in Convocation, and to one of those articles—(whether it received the royal assent or not, is doubtful)—it is proper that the attention of the Court should be directed. It is, I believe, in Collier's Church History, and in Bishop Gibson's Codex. It deserves serious consideration, having apparently a different bearing from the ritual to which I have adverted. The article to which I allude is in Bishop Gibson's Codex, vol. i. p. 369, chapter 9,—“Private Baptism in the Church of England.” In the manuscript copy of the articles made in the Convocation, anno 1575, the twelfth is,

c. 1. 1.

“ Item.—Where (meaning whereas) some ambiguity and doubt  
 “ hath arisen amongst divers, by what persons private  
 “ baptism is to be administered; forasmuch as by the  
 “ Book of Common Prayer, allowed by statute, the bishop  
 “ of the diocese is authorized to expound and resolve all  
 “ such doubts as shall arise concerning the manner how to  
 “ understand, do, and execute the things contained in the  
 “ same book; it is now by the said archbishop and bishops  
 “ expounded and resolved, and every of them doth ex-  
 “ pound and resolve, that the said private baptism in case  
 “ of necessity, is only to be ministered by a lawful minister,  
 “ or deacon, called to be present for that purpose, and by  
 “ none other. And that every bishop in his diocese shall  
 “ take order that this exposition of the said doubt shall  
 “ be published, in writing, before the 1st day of May

" next coming, in every parish church of his diocese in  
 " this province ; and thereby all other persons shall be  
 " inhibited to intermeddle with the ministering of baptism  
 " privately ; it being no part of their vocation."

I have stated this fully ; and, *prima facie*, it seems to be against us. Bishop Gibson says, " This article was not published in the " printed copy." Fifteen articles were passed ; and to the fifteenth Queen Elizabeth refused her assent. The other articles were printed, but the twelfth was not ; at least, that is, on the authority of Bishop Gibson. The words of Gibson are—" This article was " not published in the printed copy, but whether on the same " account that the fifteenth article was left out (namely, because " disapproved by the crown) I cannot tell." It was not printed with the rest ; the probability is, that it did not receive the royal assent. " However," Gibson proceeds, " the ambiguity remained " till the Conferences at Hampton Court, in which the king said, " that if baptism was termed private, because any but a lawful " minister might baptize, he utterly disliked it, and the point was " there debated." This shows that, if the point was then debated, it was not settled in 1575. My learned friends cannot show that this supposed article of Convocation made an alteration ; when, according to their own fourth article, they admit that the practice of lay-baptism was allowed in 1603. They cannot, therefore, maintain that this article of 1575 made the alteration. If it had made the alteration, which my learned friends will contend for, I say they are not able to make use of it, after their admission in the fourth article, that lay-baptism was tolerated to 1603. Gibson proceeds, " Which debate ended in an order from the Bishops to explain it, " and restrain it to the lawful ministers."

Well, then, this article was not printed with the others :—whether it ever received the royal assent, Bishop Gibson cannot tell. But I submit, that if it did pass the Houses of Convocation, and receive the royal assent, it could not alter the rubric of Edward VI. ; because that rubric had been confirmed by act of parliament. That, like the rubric which now prevails, was part and parcel of an act of parliament, and therefore the Convocation had no power to make the alteration. I deny that it was made ; but if the Convocation made the alteration, they had no power to do so. But what was the meaning of the article ? Not to say that henceforth lay-

baptism should be invalid,—that what the people had been told was good baptism, should cease to be good baptism. The great fallacy that seems to prevail upon the other side is this, that because matters were ordered for the sake of regularity, all that is done contrary to regularity is entirely null and void. It does not appear to me that this follows as a necessary consequence. It might be that, for the sake of regularity, even in cases of necessity, ministers should be called in; but it does not follow, that, because that was deemed matter of regularity and order, lay-baptism, which had before been deemed valid, should become null and void. There is great doubt whether this article ever passed the Convocation, or ever received the royal assent. It is not a little remarkable, that, although the article was to be circulated in every parish in the kingdom, it seems to have been very little known, having altogether escaped the attention even of the great Hooker, who wrote a very few years afterwards. At the Conferences at Hampton Court, too, this article of 1575 was not mentioned; nothing was said of any alteration having been made in the law.

I have stated to the Court that I thought my learned friends were precluded from making use of these constitutions of 1575, by the manner in which they have pleaded in the fourth article; but I will also request the attention of the Court to the contents of their fifth article. This article pleads—

“ That in the Liturgy imprinted by the deputies of Christopher Barber, printer to the Queen's Most Excellent Majesty, A.D. 1595, in the part which is entitled ‘ Of them that be baptized in private houses,’ the rubric directs as follows:—‘ First, let them that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child, and dip him in water, or pour water upon him, saying these words,—I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’ ”

This is coming back to the ritual of Edward VI. No notice is taken of the supposed alteration in 1575. This Liturgy is published by authority,—*cum privilegio*,—according to the act of parliament; and it directs thus—“ Let *them that be present* call upon God for his grace, and say the Lord's Prayer, if the time will suffer, and then *one of them* shall name the child, and dip him in

" water, or pour water upon him, saying these words,—I baptize  
" thee in the name of the Father, and of the Son, and of the Holy  
" Ghost." I am very much obliged to my learned friends for  
giving us this information, and showing us what was the state of  
the law in 1595 ; for if there had been a shadow of a doubt cast  
upon it by the supposed article of 1575, it is most effectually re-  
moved by this book, imprinted by authority in 1595.

We now come to the year 1603, when the supposed alteration  
took place. This is, certainly, a very important point in the case,  
and to what took place on this occasion, and the alterations which  
were then made, it will be necessary that I should call the attention  
of the Court, with some degree of particularity. The rubric which  
was then prepared directed that " The pastors and curates shall  
" often admonish the people, that they defer not the baptism of  
" infants longer than the Sunday or other holy day next after the  
" child be born, unless upon a great and reasonable cause declared  
" to the curate, and by him approved. And also they shall warn  
" them, that without great cause and necessity, they procure not  
" their children to be baptized at home in their houses. And when  
" need shall compel them so to do, then baptism shall be adminis-  
" tered on this fashion :—First, let the lawful minister, and them  
" that be present, call upon God for his grace, and say the Lord's  
" Prayer, if the time will suffer. And then, the child being named  
" by some one that is present, the said lawful minister shall dip it  
" in water, or pour water upon it, saying these words,—' I baptize  
" thee in the name of the Father, and of the Son, and of the Holy  
" Ghost. Amen.' "

The great difference between the two rubrics is this :—instead of  
" one of them that be present," we have it here directed that the  
lawful minister is to perform the baptism. This I submit is merely  
matter of order, and that there is nothing annulling what had been  
the doctrine of the Church. It was thought more decent and proper  
that a lawful minister should be procured. What is the meaning of  
the words " lawful minister ?" Why, they must mean a " lawful  
minister " of the Church of England : they can mean no other  
person. And can the Court believe that it was intended to say that  
no persons whatever were validly baptized, or entitled to Christian  
burial, unless they were baptized by a minister of the Church of  
England ? Can the Court—unless the terms of the law are so strict

and precise as to leave no possibility of any other interpretation being put upon them—can the Court come to the conclusion that Christian burial is to be refused, in this Christian country, to every person who has not been baptized by a minister of the Church of England? See the consequences of this. In the first place, the thousands of foreigners in this metropolis, or in other parts of the kingdom, could not be entitled to Christian burial. My learned friend, when asked what is meant by the words “ lawful minister,” says, a minister episcopally ordained. But is that the true meaning of the words, as they are here used? My learned friend seems to think they include all persons episcopally ordained; therefore they would include Roman Catholic clergymen. Does he mean that it was the intention of the persons who composed this ritual, that if Roman Catholic clergymen baptized, their baptism would be valid, while baptism by a Protestant layman would be null and void? This would exclude thousands of foreigners in this country, and some too of the highest rank and station—some in the highest station—from Christian burial. Can my learned friend for a moment conceive that the Church of England would be guilty of such an indecency? It would exclude, also, very many of our fellow subjects. Look at the kingdom of Scotland;—the established religion of that country is Presbyterianism;—the great body of our fellow subjects in Scotland have been baptized by Presbyterians; but who ever heard of burial being refused to a Scotchman in this country, merely because he had been baptized by a Presbyterian minister? It would exclude, also, most, if not all, persons whose bodies are driven on shore upon our coasts. There is an act of parliament\* which directs the burial of persons so cast on our shore, whether foreigners or not; and it not only requires that the bodies shall be buried in the church-yard, but also directs that the parish is to pay the minister the fees for the burial, thus implying that the burial service is to be performed over the bodies. I am certain this rubric was never intended to admit the validity of baptism performed by a minister of the Church of Rome, and deny, at the same time, the baptism of foreign Protestant Churches. It merely, for the sake of order and regularity, directs that baptism shall be performed by a lawful minister; but it does not alter the law as it stood before, or say that baptism by any other person shall be utterly null and void;

\* 48 Geo. 3, c. 75.

or that persons who have not received baptism at the hands of ministers of the Church of England, shall not be deemed Christians.

These are the material alterations in the Liturgy ; but to ascertain what was the real meaning of the parties by whom those alterations were made, it may be well to see what passed at the Conferences out of which the alterations arose. For that purpose, I must call the attention of the Court to a work of Dr. Cardwell's, —a "History of the Conferences on the Book of Common Prayer." Dr. Cardwell has collected together a great deal of information as to the revision of the Liturgies at different times. We now consider the revision of the Liturgy in the reign of James I., 1603. In the early part of James's reign, an address or petition was presented to him from the Puritans, who were dissatisfied with the Liturgy, and required some alterations in it. The first objection they took to the church service was this,—"Baptism not to be "administered by women, and so explained."—(p. 131.) They did not require that all lay baptism should be declared invalid, but that baptism should not be administered by women. The Conferences which arose out of this address commenced on the 14th of January, 1604, James having come to the throne in the preceding year. Among the accounts of these Conferences, is one given by Dr. James Montagu, who was dean of the Chapel Royal. He wrote a short account of the Conferences to January 18, when they were concluded. Dr. Cardwell says, (p. 138,) "This account is "written by a person evidently favourable to the Court." Dr. Montagu says, "For the private baptism, it held three hours at least ; "the King alone disputing with the Bishops so wisely, wittily, and "learnedly, with that pretty patience as I think never man living "ever heard the like. In the end he won this of them, that it "should only be administered by ministers, yet in private houses "if occasion required." This is a little ambiguous. He proceeds —"And that whosoever else should baptize, he should be under "punishment." But the King did not win from them that baptism by a layman was to be held null and void ; the Puritans did not ask that ; James did not require it of the Bishops, but only that, as a matter of order, the lawful minister should baptize. It should seem from what passed afterwards, that James was as strong as any of the Bishops in his opposition to the iteration of baptism ; but does not this dislike to the iteration of baptism afford conclusive

proof that he did not hold lay baptism to be null and void? If lay baptism is, as it is contended, quite void—as if nothing had taken place—how was it that neither James nor the Bishops would allow a person who had been baptized by a layman to be baptized again? What, is Christian burial to be refused to a person, because, without his or her consent, an individual not properly constituted a minister, has administered the rite of baptism? This does appear to be a most extraordinary proposition.

But the fullest and best account I can find of these Conferences is given by Dr. Barlow, the Dean of Chester. He gives an account of the three days' Conference. After mentioning other subjects, he says, (p. 172,) "The third was private baptism, if private for place, his Majesty thought it agreed with the use of the primitive Church; if for persons, that any but a lawful minister might baptize anywhere, he utterly disliked. In this point his highness grew somewhat earnest against the baptizing by women and laics." Now let us see who were the persons present, and who took a share in the discussion. Whitgift, then Archbishop of Canterbury, was present. Dr. Barlow says, "Archbishop Whitgift proceeded to speak of private baptism, showing his Majesty that the administration of baptism by women and laics was not allowed in the practice of the Church, but inquired of by the bishops, and censured."—(p. 174). They censured it, but they did not say it was null and void. "The King excepted, urging and pressing that the words in the Liturgy could not but intend a permission and suffering of women and private persons to baptize. The Bishop of Worcester said, that indeed the words were doubtful, and might be pressed to that meaning, but yet it seemed by the contrary practice of our Church, (censuring women in that case), that the compilers of the book did not so intend them, but profounded them ambiguously, because, otherwise perhaps, the book would not then have passed in the parliament."

What said Bishop Bancroft, then Bishop of London, and afterwards Archbishop of Canterbury. The very circumstance of his being shortly afterwards promoted by King James to the see of Canterbury, shows that the King was not very angry at the doctrine he promulgated. "He (that is, Bishop Bancroft) replied that those learned and reverend men who framed the Book of Common Prayer, intended not by ambiguous terms to deceive

“ any, but did indeed, by those words, intend permission to private persons to baptize in case of necessity, whereof their letters were witnesses, some parts of which he then read ; and withal declared “ that the practice was agreeable to that of the ancient Church.” His Majesty replied, in substance, “ That though he maintained “ the necessity of baptism, he utterly disliked all re-baptization, “ even though women and laics had baptized.” Therefore it follows, *ex necessitate*, as he would not allow re-baptization, that he considered baptism by a laic or a woman was not absolutely, and to all intents and purposes, null and void. He thought it was an improper way of admission into the Church of Christ, but that persons having been so admitted need not be baptized again.

But there is another person who is mentioned by Dr. Barlow,—the Bishop of Winchester, Dr. Bilson. “ Here the Bishop of Winchester spoke very learnedly and earnestly on that point, affirming that the denying of private persons to baptize, in the case of necessity, were to cross all antiquity ; and that it was a rule agreed upon among divines, that the minister was not of the essence of the sacrament.”

“ His Majesty answered, that though he be not of the essence of the sacrament, he is of the essence of the right and lawful ministry of the sacrament.” The result was a consultation, whether into the rubric of private baptism which leaves it indifferently to all, laics or clergy, the words “ curate or lawful minister ” might not be inserted, which, it is said, “ the Bishops did not so much stick at.”—(p. 176.) Could it be clearer, what was the real meaning and intention of the persons who made this alteration ?

I would also remind the Court of the Catechism of the Church of England. The Catechist asks, “ How many sacraments hath Christ ordained in his Church ?” The answer is, “ Two only, as generally necessary to salvation ; that is to say, baptism, and the Supper of the Lord.” It is then asked, Q. “ What meanest thou by this word *sacrament* ? A. I mean an outward and visible sign of an inward and spiritual grace given unto us, ordained by Christ himself, as a means whereby we receive the same, and a pledge to assure us thereof. Q. How many parts are there in a sacrament ? A. Two ; the outward visible sign, and the inward spiritual grace. Q. What is the outward visible sign or form in baptism ? A. Water ; wherein the person is baptized in the

“ name of the Father, and of the Son, and of the Holy Ghost. “ Q. What is the inward and spiritual grace? A. A death unto “ sin, and a new birth unto righteousness: for being by nature “ born in sin, and the children of wrath, we are hereby made the “ children of grace. Q. What is required of persons to be bap- “ tized? A. Repentance, whereby they forsake sin; and faith, “ whereby they stedfastly believe the promises of God made to “ them in that sacrament. Q. Why then are infants baptized, “ when by reason of their tender age they cannot perform them? “ A. Because they promise them both by their sureties; which “ promise, when they come to age, themselves are bound to per- “ form.” Therefore the Catechism gives as the essentials, baptizing with water, and in the name of the Father, and of the Son, and of the Holy Ghost,—not speaking of the minister as of the essence of baptism.

I submit, therefore, that the result of those Conferences, and of the alterations then made, is to show that the words “ lawful mi- “ nister” were introduced merely as a matter of order and regula- rity, and did not tend to alter the doctrine of the Church as to the validity of lay baptism; and there was not then, nor has there been at any other time, a declaration of the Church that lay bap- tism was null and void.

So the matter stood till the Conference in 1661, after the Resto- ration, and then attempts were again made to have an alteration. Very little was done; there was only an alteration in the title, making it rather more general than it was before. The Court is aware that at that Conference exceptions were taken, requiring an alteration almost of the whole and entire Liturgy. As to private baptism, the exceptors say (Cardwell’s Conf. p. 356), “ We desire “ that baptism may not be administered in a private place.” The bishops answer, “ So do we; where it may be brought into the “ public congregation. But since our Lord hath said, ‘ Unless one “ be born of water and of the Holy Ghost, he cannot enter into the “ kingdom of heaven,’ we think it better they should be baptized “ in private, rather than not at all. It is appointed now to be done “ by the lawful minister.” But it is not said that it shall not be done by a layman. “ Nor,” proceed the bishops, “ is any thing “ done in private to be iterated in public,” &c. There is, then, no alteration made here. With the exception of a slight alteration in

the title of the office, which only leaves it rather more at large than it was before, so the matter has stood down to the present time. I know that discussions and differences of opinion have taken place as to the validity of lay baptism; but the highest authority for the validity of lay baptism has been the authority of the Church of England.

It is true that, at this time, another office of baptism was super-added to the Liturgy, namely, that “ for the baptism of such as are of riper years.” There seems to have been a deficiency in this respect till 1661. I see the reason for this office put forth by some writers is, that during the troubrous times many of his majesty’s subjects had not been baptized by episcopally ordained ministers; many persons had been baptized by laymen, and others who were not ordained ministers; and it was for the purpose of remedying the evils which arose from that, that this form of baptism was introduced into the Liturgy. But the preface entirely does away with that supposition. It is there set forth that this form was introduced on account of the “ growth of anabaptism,” not of lay baptism; because persons had not been baptized at all, not because there was to be an iteration of baptism for those who had been baptized by laymen in the troubrous times.

From this time there has been no alteration in the Liturgy. Attempts have been made to obtain alterations in various respects; but in this respect it remains the same. The matter seems to have rested pretty quietly from 1603 till the beginning of the next century. I cannot say that no discussion did arise; but the first I find mentioned is about 1709 or 1710, when a person named Lawrence, a book-keeper in the city, who had been bred a Dissenter, and baptized by a layman, came over to the Church. He became a member of the Established Church; and so essential, in his mind, was episcopal ordination to the right performance of baptism, that he applied to the minister of Christ Church, Newgate Street, to procure himself to be baptized according to the rites and ceremonies of the Church of England; and that gentleman complied with his request, and performed the ceremony. Mr. Lawrence, being very zealous in the cause he had espoused, and, I have no doubt, very conscientiously, published a tract on the subject, enforcing the necessity of being baptized by an episcopally ordained minister. This seems to have drawn the attention of the Rev. Mr. Kelsall to

the subject ; and he wrote two letters, which are to be found in the tenth volume of Dr. Waterland's Works, edited by the late Bishop of Durham. Dr. Waterland took the same view of the question as Lawrence. Bishop Fleetwood took an opposite view, in his " Judgment of the Church of England on Lay Baptism." This book is exceedingly well worth the Court's attention ; it is most clear and convincing on the subject. I am not going to enter into the books of Lawrence, Kelsall, and Dr. Waterland, because they partake more of divinity than of law. Dr. Waterland held the doctrine and practice of the Church of England to be wrong. If I get evidence from him, I think it comes with tenfold force. He contended for the inefficacy of lay baptism. Dr. Waterland (vol. x. p. 185) says, " But it is now time to subjoin something with relation to the " judgment and practice of the Church of England in our present " debate. I shall be brief upon this last, concluding that by this " time you are heartily tired. On a careful view of what has been " said on both sides as to the judgment and practice of our Church, " I take the case to be this : First, the Church of England has in " no place, distinctly and in terms, determined the controversy " either way : Second, her practice, and the stream of her divines, " has been all along against us ;" that is, in favour of lay baptism. This was written long after that supposed alteration in the law which my learned friend says took place in 1603 ; this was in 1712, or thereabouts, about a century before the decision in the important case of *Kemp v. Wickes*.

But something else took place in 1712, which quite confirms Dr. Waterland's statement as to the " practice," and " stream of the divines" of the Church of England. There was a Convocation in 1712 ; this was after the discussion as to the rebaptization of Lawrence, and the treatises published in consequence of that occurrence attracted the attention of the House of Convocation. Bishop Burnet, in his " History of his Own Time,"\* gives an account of this matter. He says ; " Another conceit was taken up, of the " invalidity of lay baptism, on which several books had been writ. " Nor was the dispute a trifling one, since by this notion the " teachers among the Dissenters, passing for laymen, said this went " to the rebaptizing of them and their congregations." Then he

\* Folio edition, 1734, vol. ii. pp. 603, 604, 605.

goes on to say, "One Dodwell, a very learned man, gave rise to "this conceit. This made the Dissenters pass for no Christians, "and put all thoughts of reconciling them to us far out of view. "And several little books were spread about the nation to prove "the necessity of rebaptizing them, and that they were in a state of "damnation till that was done. This struck even at the baptism "by midwives in the Church of Rome. Nothing of this kind was "so much as mentioned in the year 1660, when a great part of the "nation had been baptized by Dissenters, but now it was promoted "with much heat." Then he goes on—"The bishops thought it "necessary to put a stop to this new and extravagant doctrine." Therefore, according to this bishop, the practice was the other way; this doctrine is "new and extravagant;" it is a "conceit;" an "extravagant conceit." "So," says the bishop, "a declaration "was agreed to, first against the irregularity of all baptism by per- "sons who were not in holy orders; but that yet, according to the "practice of the primitive Church, and the practice of the Church "of England, no baptism in, or with water, and in the name of the "Father, of the Son, and of the Holy Ghost, ought to be reiterated. "The Archbishop of York at first agreed to this; so it was resolved "to publish it in the name of all the bishops of England. But he "was prevailed upon to change his mind, and refused to sign it, "pretending that it would encourage irregular baptism. So the "Archbishop of Canterbury, with most of the bishops of his pro- "vince, resolved to offer it to the Convocation. It was agreed to "in the Upper House, the Bishop of Rochester only dissenting. "But when it was sent to the Lower House, they would not so "much as take it into consideration, thinking that it would encourage "those who struck at the dignity of the priesthood."

I now request the attention of the Court to the opinion of a person, who was not only a divine, but a lawyer also—Dr. Watson, the author of the "Clergyman's Law," a book abounding with accurate information, and of very high authority. Dr. Watson says (page 318,\* chapter 31) that "A child baptized with water, in the name "of the Father, and of the Son, and of the Holy Ghost, is suffi- "ciently baptized, though not baptized by a lawful priest, as may "be collected from the rubric." Here is the interpretation of the

\* Folio edition, and at pp. 586, 587, 8vo. edition, 1712.

rubric by a lawyer. He looks at the ritual now in use, as compared with those of Edward VI. and Elizabeth, and the construction he puts upon it is, that lay baptism, though irregular, is valid. He proceeds: " And so it is if the child be baptized by other form ; " yet the person baptizing, not being a lawful priest, is punishable, " like as a lawful priest baptizing by other form than is set down in " the Book of Common Prayer is punishable."

With respect to one of the Thirty-nine Articles, the twenty-third, which was referred to as showing the doctrine of the Church of England on this point, I would just request the attention of the Court to a passage from Bishop Burnett, whose work on the Articles is held in high esteem. The Article says, " It is not lawful for " any man to take upon him the office of public preaching, or " ministering the sacraments in the congregation, before he be law- " fully called, and sent to execute the same." Bishop Burnet writes, " We have reason to believe that none ought to baptize " but persons lawfully ordained. But since there has been a prac- " tice so universally spread over the Church, allowing the baptism, " not only of laics, but of women, to be lawful, though we think " this is directly contrary to the rules given by the Apostles ; yet " as this has been in fact so generally received and practised, we " do not annul such baptisms, nor rebaptize persons so baptized.

In conclusion, I shall call the attention of the Court to the authority of Richard Hooker, before referred to, and of the very learned Mr. Bingham, who has discussed this matter at very great length. Hooker, in his fifth book, goes at large into the question, and concludes the chapter devoted to the discussion in these words: " Whereupon we may consequently infer that the administration of " this sacrament by private persons, be it lawful or unlawful, ap- " peareth not as yet to be merely void." One of the sections of Bingham's work is on the practice of the Church of England in this point. His work is entitled " Scholastic History of Lay Baptism," and in Part i. Chap. 3, sect. 5, we read that " Dr. George Abbott," who succeeded Bancroft as Archbishop of Canterbury, " in his " theological lectures before the university of Oxford, largely " maintains the same opinion, that such baptisms, though irregularly " given, are not to be repeated." This was after 1603, and therefore he did not consider that the matter was settled. His reason is, " Because the minister is not of the essence or being of the

“ sacrament, but of the well being. It is most agreeable to the rules of piety to have it done by a minister, but it is done, though done by another.” Can words be plainer or more precise? Secondly, he argues from the axiom of the law, which is, *Multa fieri non debent, quae tamen facta valent.*

He argues, thirdly, from the general and perpetual consent and practice of the Church, and from the sense and practice of the Church of England. He argues, lastly, “ from the inconveniences which would attend the contrary practice, among the whole congregation of Christians.” For if no one can baptize but an episcopal minister, who can be certain of his own baptism?

Has no one taken the office of the priesthood, who has not been baptized, except by a layman? We have had an Archbishop, and a Bishop, who had not been baptized except by a layman. Archbishop Secker and Bishop Butler were baptized by Dissenters;—were they to be considered excommunicate—were they to be deemed heathen—because they were not admitted into the Church by an episcopally ordained minister? This would be a startling doctrine indeed. Archbishop Abbott, therefore, concludes upon the whole matter, that “ baptism is valid, though given by a layman or woman, having the perpetual consent of the Church, and not being repugnant to the truth of the divine oracles.” Bingham informs us further, that Isaac Casaubon says, “ What was heretofore said by Tertullian, concerning the primitive Church, that baptism is administered by bishops, priests, and deacons, and that laymen, also, in cases of extreme necessity, might do it, the very same is now observed in the Church of England. And for the baptism of lay-persons, men or women, though she forbid it to be done by her laws, yet when it is done in due form, she does not altogether disallow or reject it, pronouncing it to be baptism, though not lawfully administered.” A little further on, Bingham says, “ At least Casaubon and King James, who were very capable of knowing her sense”—the sense of the Church of England—“ so understood it, and we do not find many that have been inclined to contradict them. So that upon the whole it may be concluded, that what Casaubon said in the name of King James is the present sense of the Church of England:—she forbids women or laymen, by her laws, to baptize, but if done in due form she does not

" wholly disannul it, or order it to be repeated, as absolutely null and void."

I have brought to your notice such authorities as I have been able to find; and I must now leave the case to the superior knowledge and wisdom of the Court. But I do not feel any of that diffidence in the justice of the cause I have to advocate, which was suggested by my learned friend. The moderation with which I requested the Court to act, did not spring from any doubt in the merits of the case;—it showed that the promoters of this suit were not actuated by vindictive feelings, and I think it did them high credit and honour.

I trust the Court will be of opinion that it is sufficiently established, that by the doctrine and discipline of the Church of England, lay-baptism, though irregular, is valid; and that parties baptized by a layman are entitled to Christian burial in the church-yard of the parish in which they die. I pray, therefore, that the Court will pronounce that the articles given in are sufficiently proved,—that it will admonish Mr. Escott to abstain from the like conduct in future,—and that it will condemn him in the costs of the suit. I think it right to ask for costs in the case, because the discussion of this question was unnecessary; it having been settled by your most worthy predecessor in that chair, in the year 1809.

*Sir HERBERT JENNER.*—Has the Court power to impose any other penalty than that specified by the canon—that of suspension for three months? Would it not be illegal to pass any other sentence than that pointed out by the canon? Has the Court any discretion?

*The Queen's Advocate.*—Perhaps not. I must therefore make my prayer in obedience to the law, and ask that Mr. Escott may be canonically punished.

*Dr. Haggard.*—This proceeding is against a clergyman of the Established Church for refusing to bury an infant in the church-yard of the parish in which the child died; the clergyman being perfectly aware that she had been baptized,—and convenient warning having also been given to him of the intended burial. The question, therefore, depends, in this case, as in that of *Kemp v. Wickes*, upon what is the true meaning of the word "unbaptized," in the rubric prefixed to the burial service of the Church. It was the object of the late Dean of the Arches, in the case of *Kemp v.*

Wickes, to ascertain the true meaning and interpretation of the word "unbaptized," in its ecclesiastical sense: and in that case, as in the present, it was stated in the articles that the baptism was imparted with water, and by the invocation of the Father, and of the Son, and of the Holy Ghost. It was also a circumstance in that case, as in the present, that the rite was performed by a dissenting minister: but it was not necessary for that learned judge to decide, nor did he decide, whether the performance of the ceremony by a dissenting minister rendered the rite more valid than if it had been performed by a mere layman. The judgment, in *Kemp v. Wickes*, glances at that fact; but it was not the point decided in that able and luminous judgment. The learned judge took grounds on which I shall attempt humbly and imperfectly to follow him; namely, to show that baptism, when performed with the proper matter, and with the proper invocation, is valid according to the doctrine of the Church of England, so as to secure to the party who receives it a right to Christian burial. Whether therefore it be administered by a layman, or a dissenting *minister*, is immaterial to the question.

If it were necessary to consider—and there might be cases where it would be necessary to consider—how far the rites of the Church might be performed by persons duly qualified to act as dissenting ministers, then it would be also necessary to consider the Toleration Act of William—extended by an Act passed in the 52nd Geo. III., (about three years subsequent to the decision in *Kemp v. Wickes*); and perhaps also an act of last session, by which some non-parochial registers were made evidence in courts of justice. If then it were necessary to consider how far a person, performing the rites of the Church, not being a minister episcopally ordained, is exempt from ecclesiastical censure, such an inquiry would involve the consideration of statutes which it does not appear to me necessary further to dwell upon. I do not rely upon the fact that this child was baptized by a Wesleyan Minister, any more than I do upon the fact that when the rite of baptism was performed the child was in a state of illness which rendered the performance of that rite necessary. The question is not in what light Mr. Wesley and his followers might regard the mode of imparting this Sacrament; nor whether the fact of a child's being in health or sickness makes the slightest difference; for if it be valid when performed by a layman

in a case of necessity, it must, I apprehend, be valid if performed at any other time.

The defendant pleads that he was authorized and required to refuse the burial service to this child, inasmuch as it had not been baptized by a regularly episcopally-ordained minister: he rests his refusal upon that ground. He avers that he did not act in contempt of the laws, canons, and constitutions of the Church of England; but in obedience to, and in conformity with, the obligations by which he bound himself, when he became an ordained minister. In the tenth article he pleads, that "Elizabeth Ann Cliff was not in fact "baptized by the said Elisha Balley, but the said pretended baptism, if performed as therein alleged, was altogether invalid, and "contrary to, and in contempt of, the doctrine and discipline of the "Church of England, and of the laws, canons, constitutions, and "rubrics, hereinbefore more especially propounded and set forth." This is the ground on which the defendant rests his justification.

Now the Queen's Advocate has stated that it is admitted in the fourth article of the defensive allegation, that at least up to the time of the accession of James I. lay-baptism was tolerated; but still I shall point out one or two circumstances which will show how lay-baptism was regarded anterior to the time of the Reformation. In a constitution of Ecgbriht, Archbishop of York in the year 740, (which will be found in vol. i. of Johnson's Ecclesiastical Laws,) that prelate first prescribes a penance to the parent, through whose neglect a child dies unbaptized; and orders, that a priest who should neglect to go to baptize when asked, should "be chastised by the "doom of a bishop for the damnation of a soul." He then adds, "But all the faithful may do this when they find any dying unbaptized; nay, it is commanded that men should snatch a soul from "the devil by baptism; that is, by baptizing them with water "simply blessed in the name of the Lord, by immersing them, or "pouring water upon them, in the name of the Father, and of the Son, and of the Holy Ghost."

Ayliffe, in his Chapter on Baptism, (Parergon, p. 102,) says, "Baptism is the first of the two Sacraments of the Church of England; the gate or entry into Christianity itself." He says also, "In respect of the person that administers baptism, he ought, according to the canon law, either to be a bishop or a priest, unless

“ it be in cases of extreme necessity ; for, by the canon law, deacons  
 “ ought not to baptize without the command of the bishop or  
 “ priest ; unless a bishop or priest should happen to be at a great  
 “ distance, or extreme necessity should require it ; for in a case of  
 “ necessity, in the absence of a bishop or priest, a deacon may *suo*  
 “ *jure* baptize and administer the Eucharist unto persons sick or  
 “ weak. But in case of sickness, not only a deacon, but even a  
 “ layman and a woman may baptize, as well as hear confessions in  
 “ the Romish Church, though none but a priest can give true abso-  
 “ lution.” He then goes on to speak of the dispute in the primitive  
 Church respecting the rebaptizing of heretics, and says, that though  
 such rebaptization “ was resolved, and ordered by the bishops in  
 “ the Council of Carthage held under St. Cyprian (as he relates the  
 “ matter in his Epistles), yet his opinion was afterwards disallowed  
 “ of by others and not received in the Church.” He proceeds to  
 narrate the history of the baptism of some children at Alexandria  
 by Athanasius, while he was yet a boy ; which baptism the bishop  
 forbad the repetition of, though it had been administered only in  
 sport : and adds further, on the same subject, “ By a provincial  
 “ constitution in Lyndwood a priest was heretofore prohibited the  
 “ rebaptizing of persons that had been baptized even by a layman ;  
 “ and such priests as questioned the validity of lay baptism, and  
 “ rebaptized such persons, were by that constitution looked upon  
 “ as foolish and ignorant men.”—(pp. 104, 105.) If, therefore, in  
 ease of sickness, a power is imparted to a layman to confer this  
 rite, it shows that the rite may be validly conferred by a layman, or  
 the necessity would not make that sound and valid which is contrary  
 to the doctrine of the Church.

In a valuable work by Mr. Palmer, on the “ Antiquities of the English Ritual,” published at Oxford in 1832, he says (chap. v. section 9), “ It is unnecessary for me to enter on the discussion  
 “ relative to the proper ministers of baptism, (which has been  
 “ treated with his usual learning by Bingham, in his Scholastical  
 “ History of Lay Baptism). The Church of England has not  
 “ encouraged the practice of baptizing children, either by laymen  
 “ or women, even in urgent cases.” Although, therefore, it is not  
 encouraged, Mr. Palmer does not say that it has been declared  
 invalid.

With these observations upon the general state of the law, I

shall consider the question as affected by the judgment in *Kemp v. Wickes* : and I am rather surprised at the manner in which the fourth article of the defensive allegation in this case concludes ; namely, " that from that period (the period of the Conferences at Hampton Court) to the present day, the Liturgy of the Church " of England has not allowed the rite of baptism performed by " unordained persons to be valid, but has held the direct contrary." This averment seem to me not tenable.

We, however, have to maintain that a child baptized with water, and the proper invocation, is admitted into the Church, and is entitled to Christian burial. On the other hand, my learned friends undertake to show, that since the accession of James, upon the revision of the Liturgy in 1604, the Church of England has not allowed the rite of baptism, performed by unordained persons, to be valid, " but has held the direct contrary." If this had been pleaded anterior to the case of *Kemp v. Wickes*, when there had been no decision as to the meaning of the word " unbaptized" in the burial service of the Liturgy, there might have been a pretence for the averment ; but I do not know how it now can be averred in opposition to that judgment,—a judgment not appealed from, but acquiesced in, so far as I know, for thirty years—and which decided the meaning of the word " unbaptized," not only in its legal, but in its ecclesiastical sense ; I cannot then understand how the defendant can put forward with confidence such an averment, or expect to maintain it : I am far from agreeing with it. The case of *Kemp v. Wickes* gives an exposition—the true interpretation—of the meaning of the word " unbaptized" (and that is the subject of this controversy) ; and the main object of the learned judge who decided that case, was to ascertain the true meaning of that word. The result of his research is, that a child baptized with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by whomsoever the rite is performed, is a child baptized according to the doctrine of the Church of England. I venture to say, a clearer, or more logical, or more powerful argument could not have been framed on any subject ; so far, at least, as I am competent to intimate an opinion in respect to this very valuable decision. And how does the learned judge treat the subject ?

He first considers what was the object of the sixty-eighth canon.

He states, in page 267,\* that the canon was "not made merely for "the protection of the clergy, but made for their discipline also, "and to enforce the performance of their duty," and that it "prohibits the refusal of burial in all cases except in the case of ex-communicated persons, and punishes such refusal." Having taken this summary review of the object of that canon, he points out the limitations under it: he then, at page 270, says "The plain "simple import of the word 'unbaptized,' in its general sense, and "unconnected with the rubric, is, obviously, a person not baptized "at all, not initiated into the Christian Church;" a person, therefore, who does not come within the description of being a Christian. That, as I understand, is the position which the learned judge lays down. And how does he support it? He proceeds to consider where the word "unbaptized" is used. It is in the rubric before the burial service. When was that rubric first proclaimed? Not till after the Restoration, in 1661. And with whom do we find the word associated? With persons excommunicate, and with suicides. As to the first of these classes, enough has been said to-day to show in what respect the law now differs from what it was at the time this decision was given; and, as to suicides, by the act 4 Geo. IV. c. 22, the law enjoins that they shall be privately interred at particular hours; but at the same time that it directs their private burial in consecrated ground, there is an express reservation with regard to the service of the Church, which is not to be performed over them.

In following out this judgment—(and I intend, in some measure, to take the Court through it, for it appears to me a more able argument than I could otherwise address to it), the learned judge says, "Having thus considered the words in their general meaning, and "as connected with the context of the law, it may not be improper, "before the court proceeds to what is next proposed, namely, the "history of the law, to notice another rule of construction, which "is this—that the general law is to be construed favourably, and "that the exception is to be construed strictly." And I think it would have been more consistent with the defendant's calling, if he had erred, in this matter, on the side of humanity, especially when he had this decision to guide him as to the law, and the proper con-

struction of the term “ unbaptized.” The limitation of such a law ought to be considered *strictissimi juris*. The learned judge then asks, “ Does any law exclude Dissenters from burial ? It is the “ duty of the parish minister to bury all persons dying within his “ parish, all Christians. The canon was made to enforce the per-“ formance of that duty, and to punish the refusal of burial : no-“ thing can be more large than the canon is in this respect. It “ does not limit the duty to the burial of persons who are of the “ Church of England ; he is to bury all persons that are brought “ to the church, upon convenient warning being given to him. “ The canon has the single exception, expressly, of excommuni-“ cated persons. The rubric adds the other express exceptions, of “ persons unbaptized and suicides.”

I apprehend that, so long as the canon pointed out the single exception of excommunicated persons, it could not have been contended that the case of this infant fell within that exception : she had never been pronounced excommunicate ; and therefore, till another exception was added, this child, by whomsoever baptized, having been baptized with the proper form and invocation, was qualified to be received into the Christian Church, and was entitled to the rites of Christian burial. But after the Restoration a further limitation was added ; and the rubric then limited the general expression of the canon. The injunction having hitherto been, to bury all Christians except those denounced excommunicated. Now, can it be supposed, if the compilers of this rubric of 1661 meant to exclude persons baptized in the form and with the words I have mentioned, that they would have stopped so short as they have done in the words of the rubric ; would they not have expressly stated that baptism must be imparted not only with water, and in the name of the Holy Trinity,—but by a lawful minister—by which I mean a lawfully episcopally-ordained minister. The revisers of the rubric of 1661, however, though they added the word “ unbaptized,” are perfectly silent as to any requirement that, in order to its validity, baptism should be performed by a minister so ordained.

The Dean of the Arches, in another part of his judgment, advert to the fact, that in the third year of the reign of James I. executors of Papists were compelled to cause the bodies of deceased Papists to be carried to the church of the parish, there to be buried according

to the rites of the Church of England. He says, " It may not be " wholly unworthy of observation, that this very act of parliament, " compelling the burying of Popish recusants in the church or " church-yard, and by the Church, in the same manner as the other " subjects of his majesty, passed only in the third year of King " James, very soon after the alteration of the rubric." The fifteenth section of the statute referred to is in these words :—" And if any " Popish recusant shall be buried," &c. Now, were such persons members of the Church of England? No; and yet it is expressly required that their executors shall carry them to the church,—that everything is to be done according to the rites of the Church, and, therefore, that the burial service is to be performed over them.

The learned judge then goes on to consider whether lay baptism has not been recognised as valid by the Church of England. He takes the question in different ways; he considers it by tracing its history in connection with the general canon law, with reference to the constitution of the Church: and both from the one and the other he comes to this conclusion, that " though regular baptism " was by a bishop or priest, yet if administered by a laic or by a " heretic, or schismatic, it was valid baptism, and so valid that it " was not to be repeated." In looking through the constitutions, the learned judge says, " Regular baptism was to be administered " by a priest, and in the church, and at certain stated times of the " year; but in cases of urgency, a layman might administer bap- " tism in private houses, rather than it should not be administered " at all." Therefore, *Quod fieri non debet, factum valet.*

The reasoning of this judgment appears to me so conclusive, that however I may fatigue the Court by drawing its attention to the points of a judgment with which it is perfectly well acquainted, it seems to me highly desirable to examine how the question of lay baptism has been there treated.

The learned judge takes a review of the Liturgies which passed in the reign of Edward VI.; and discusses the rubric, which shows that lay baptism was valid to all intents and purposes. In further illustration of that rubric, I shall call the attention of the Court to the manner in which Bishop Fleetwood treats of it. He considers, at page 519, " The Judgment of the Church of England in case of " lay baptism and Dissenters' baptism." He quotes at the commencement, from King Edward's Liturgies, the questions to be

asked when a child is brought to the Church to be baptized, that child not having been baptized by the parish priest. He adds, " Does it not therefore follow, both from the question and the answer, that a child baptized by a lay person, in due manner and form, is lawfully and perfectly baptized ?" He goes on, at page 520, " The Church did certainly leave out the sixth question. She probably did that, to show there was no necessity for it, that question being, ' Whether the people present thought the child to be properly baptized ?' She likewise left out the third question, ' Whether they called upon God for his grace ? ' " He continues, " Whether the Church did truly take away the liberty of lay baptizing in her present Liturgy, I am now come to consider ;" and he proceeds to refer to the change of the rubric in the time of James I.

But before I proceed to advert to the Conference at Hampton Court, I must follow my learned friend in adverting to the Convocation of 1575. The learned judge, in the case of Kemp and Wickes, did not lose sight of it. He says that, " in the year 1575, among some articles agreed upon at that time in Convocation, there appears to have been one (the twelfth article) which states, ' that to resolve doubts by whom private baptism is to be administered, it is directed that in future it shall be administered by a minister only, and that private persons shall not intermeddle therein.' This article rather appears not to have been published and circulated. It remained in manuscript. It had no authority, not appearing to have been even confirmed by the crown. There could have been no doubt upon the rubric of Edward VI., coupled with what was the old law, so far as respected the validity of lay baptism ; and the Bishops certainly had not authority to alter the law ; they had only authority to explain matters which were doubtful ; and the doubt seems to have been, not whether lay baptism was valid, but whether it was regular and orderly. Up to that time, wherever private baptism was allowed, there was nothing to be found in the ancient canons, the constitutions of the Church, or the rubric, that required the minister as a person at all necessary to be present for the orderly administration of such private baptism : it was not even to be inferred that it would be more regular, for the minister is not mentioned ; on the contrary, in cases where private baptism was necessary,

"(and it was only allowed in cases of necessity), the people were "to be instructed how to perform it themselves. The most to be deduced from this article therefore is, that it was thought at that time, by the Convocation, that it would be more proper, regular, and decent, to have the ceremony of private baptism performed by ministers, and therefore it was directed to be performed by them, and laics were restrained from doing it: but the article, as before stated, does not appear to have been published." To obviate any cavil as to the word "published," I may observe it is meant that article was not published except in writing;—it was never printed, and its circulation was confined to the province of Canterbury. The Archbishop's direction, as read by my learned friend, says distinctly, "And that every bishop in his diocese shall take order that this exposition of the said doubt shall be published, in writing, before the first day of May next coming, in every parish church of his diocese *in this province.*" There is nothing to show that this article was ever adopted by the province of York. The authenticity of the article is, however, a matter of dispute. It never found its way into any printed copy of the articles of the Convocation; and Hooker, in his Fifth Book, which was written about twenty-five years after this Convocation took place, never mentions, or makes the slightest allusion to it. He concludes his sixty-second section of the Fifth Book in these words—"Whereupon we may consequently infer that the administration of this sacrament by private persons, be it lawful or unlawful, appeareth not as yet to be merely void." Is it then probable that the Church would have tolerated that as a practice which had been declared by this article not a fit subject for toleration? Had this article been in force, it could not by possibility have escaped this learned writer, who composed his work so soon after the Convocation at which the article is said to have been passed: but he omits all mention of it; and he vindicates the Church of England, as not declaring lay baptism invalid. It will therefore be for my learned friends to show that this article is entitled to the weight which they will no doubt ascribe to it; and I am not a little surprised that it was wholly omitted in the pleadings on the part of the defendant.

To what did the rubric of James I. owe its force? Merely to the King's proclamation. He did not consult either the Convoca-

tion or the parliament in order to promulge it. So soon as the Convocation had decided what the rubric should contain, the King issued his proclamation for its adoption; but the rubric was not thereby entitled to any legal authority. It however shows that a "lawful minister"—an episcopally-ordained minister of the Church of England, was not considered of the essence of baptism; it shows that the *duo necessaria* are water, and the invocation of the Trinity; and that a child so baptized is admitted a member of the Church.

Bishop Fleetwood gives a history of the Conferences of 1603: he points out the course they took; and he shows the inclinations and opinions of the King, and how they were met and combatted by the Archbishops and Bishops who were present. [Dr. Haggard here quoted, from Fleetwood, the opinions of Bishops Babington and Bancroft, &c.]

In my apprehension there was no intention, at the time this rubric was framed, to throw any doubt upon the validity of baptism by laymen, when conferred in the form and with the words I have mentioned. The effect of the revision that took place after the Restoration, was to transpose the words "lawful minister" from the title of King James's office, to the rubric. The learned judge, in Kemp and Wickes, says—"After the Restoration, the rubric "was revised, and was confirmed by parliament, and no alteration "was made, except in the title of the office: for, unless I have "been misled by a book of some authority (not having seen the "Prayer Book of the time of King James), the title of King James's "office for the administration of private baptism was this:—'Of "them that be baptized in private houses in time of necessity by "the minister of the parish or other lawful minister that can be "procured.' Now the title of the office stands thus, 'Of the mi- "nistration of private baptism of children in houses;' there is an "omission, therefore, in the title, of the words 'lawful minister,' "or anything referring to them. This alteration in the title, if it "meant anything as applied to the present question, seems pretty "strongly to infer that the title was considered as in too precise a "manner requiring both the existence of the necessity, and the "intervention of a lawful minister; and the title of the office was "therefore left in more general terms, 'Of the administration of "private baptism in houses' simply; and it was only in the "directory part, as in marriages, that it was set forth, let the 'law-

"ful minister' say so and so, inferring that lawful ministers were "the persons regularly to perform the office, and that it was considered a part of their duty. So the matter still remains; and, "after tracing the law through the several stages of its history, it appears impossible to entertain a reasonable doubt, that the "Church did at all times (whatever might have been the opinions "of particular individuals upon this point, as there will be differences of opinions among individuals upon all points—that the "Church itself did at all times) hold baptism by water, in the "name of the Father, and of the Son, and of the Holy Ghost, to be valid baptism, though not administered by a priest, who had been episcopally ordained,—or rather, to state it more generally, "though administered by a layman, or any other person. If that be so, if that is the construction of baptism by the Church of England, then the refusal of burial to a person 'unbaptized,' that term simply being used, cannot mean that it should be refused to persons who have not been baptized by a lawful minister in the form of the Book of Common Prayer; since the Church itself holds persons not to be unbaptized (because it holds them to be validly baptized) who have been baptized with water, and the invocation, by any other person, and in any other form."

That is the way in which the learned judge sums up his decision on the case. Looking at the word "unbaptized" independent of the context—taking it it associated with the words in the context—viewing it according to all the rules of construction—and illustrating his definition of it by references to divines or contemporaneous law—the result of his deliberation is, that baptism, imparted with the proper matter and invocation, was, up to the period of the rubrics in question, valid baptism, though imparted by lay hands. It was regular before the Reformation; it may be irregular now; but, when performed, it is validly performed, and cannot be iterated. There cannot, I submit, be the slightest doubt as to the sense of the Church at the accession of James—that it was opposed to those who now contend against the validity of baptism performed by persons not being properly ordained ministers. King James himself was of opinion that baptism once conferred, *duobus necessariis*, was perfectly valid.

What, then, was the view of those who assisted at the Conferences of 1661? In what way did they regard the word "unbaptized—

for then it is that this word first makes its appearance? And a consideration of the individual members who composed both Houses of Convocation, leaves no doubt in what way those eminent persons viewed the word "unbaptized." This matter is most ably discussed in the work of Bishop Fleetwood, to which I have already referred; and, indeed, coupled with the judicial decision in *Kemp v. Wickes*, it exhausts the subject. The bishop says: "The first " thing I shall observe on these changes in the rubrie is, that they " were made by the king's sole authority and command. They " had neither act of parliament, nor act of convocation to counte- " nance them. . . . Though the alterations were very reasonable " and good, yet they were not legal, till made so by the legislative " power in 1661. But, secondly, taking them as they now are to " be both good and obligatory, the question is, whether the Church " of England does hereby declare that lay baptism is invalid? . . . " I must own I do not think the Church of England does, by any or " all these rubrics, intend to make or declare lay baptism to be " invalid. She *calls* for none but lawful ministers it is true; all " churches in the world do the same thing; it is not to be expected " they should do otherwise. She does by her rubrics allow or " permit no other; that is also certain; can any church *by a rule* " allow a thing she thinks irregular? . . . . Much less can it be " expected that a rubric, which was changed on purpose to remove " doubt, should permit or allow of lay baptism. But none of these " things do either of themselves nullify and invalidate lay baptism, " or signify that the Church does look upon it as invalid when once " it is administered or conferred by a lay hand. For if it did, it " would certainly and expressly order such children to be rebap- " tized. Why should it not, since it maintains the necessity of " baptism where it may be had? . . . . Had the Church been " of the mind that lay baptism was null, invalid, and ineffectual, " her care and tenderness for all the people of this kingdom would " have obliged her to command the rebaptizing by lawful ministers, " all such as had not had a valid baptism, if they could be brought " to it. But she has nowhere intimated, nowhere suggested, much " less expressed, or plainly signified, any such purpose or design to " have it done." Again, Bishop Fleetwood argues from the practice of the bishops in 1661, of confirming those who had been baptized during the *interregnum*. " Such as they confirmed were held by

“ them to have been validly baptized.” . . . . And again, at page 531, he says, “ Although the Church should not count the “ dissenting ministers to be duly authorized and *lawful* ministers, “ yet she need not, of consequence, look upon baptism administered “ by them as null and void from the beginning. . . . . Abundance “ of people, I doubt, are easily led to think their baptisms to be “ invalid, because they think if their baptisms be allowed, the rest “ of their ministerial performances must be also valid. ‘ But this “ was held to be of no consequence by the ancient Church of Christ; “ nor is it a consequence held by the Church of England. It is “ *baptism alone* that is not invalidated and made null, though con- “ fered by an unlawful minister, or a mere lay Christian. And “ therefore a hundred passages cited either from the ancient or “ modern writers, to nullify and invalidate all the ministerial per- “ formances of unconsecrated and unlawful ministers, are insignifi- “ cant to the point in hand, unless they say expressly that *baptism* “ administered by such is *invalid*; which, I dare say, they will “ never be able to produce, provided they mean baptism adminis- “ tered in the *matter* and *form* prescribed by Christ.”

I must leave it to my learned friends to refute, if they can, this reasoning of Bishop Fleetwood; and I will proceed to quote very briefly one or two passages which he has collected out of the writings of Hooker and Thorndike, and which form the appendix to his work.

Hooker says, “ Whereas general and full consent of the godly “ learned of all ages, doth make for validity of baptism; yea, “ albeit, administered in private, and even by women; which kind “ of baptism, in case of necessity, divers reformed churches do both “ allow and defend; some others, which do not defend, tolerate: “ few in comparison, and they without any just cause, do utterly “ disannul and annihilate: surely, however, through defect on “ either side, the sacrament may be without fruit, as well in some “ cases to him which receiveth as to him which giveth it; yet no “ disability of either part can so far make it frustrate and without “ effect, as to deprive it of the very nature of true baptism, having “ all things else, which the ordinance of Christ requireth.”

Thorndike says, “ The law, the rule, the custom ‘ of antiquity “ was,’ of giving baptism by any man that was a Christian in case “ of necessity, *i. e.* rather than any one should die unbaptized.

" And that all Christians are licensed, or rather commanded, to baptize, because of the necessity of the office."

It would be merely repeating arguments over and over again, were I to proceed to show the course by which all these writers arrive at their conclusions. According to these writers, and to the judicial exposition of the law given by your predecessor, the baptism conferred upon the infant, Elizabeth Ann Cliff, was valid baptism, and such as entitled her to burial at the hands of the defendant.

The learned judge, in *Kemp v. Wickes*, refers to some historical facts illustrating and supporting his view of the question. Among others, he adverts to the fact that Presbyterians and Dissenters, after they had adhered and conformed to the Church, became members and ministers of it without being rebaptized. And the Queen's Advocate has alluded, as instances of this, to the cases of Archbishop Secker and Bishop Butler. These instances fully show the practice of admitting converts from Dissenters not only into communion with the Church, but to become ministers of the Church, without rebaptization: and Bishop Fleetwood notices that it was not till 1661 that it was necessary for ministers to be ordained after the present mode.

I will now lay before the Court the opinion of the archbishops and bishops in the year 1712, as I find it stated in the Life of Archbishop Sharp, (edited by Mr. Newcome,) vol. i. pp. 369, 375. It appears that, according to custom, Archbishop Sharp, with several bishops, dined with the Archbishop of Canterbury on Easter Tuesday, 1712; and in his Diary he gives the following account of their conversation. " We were in all thirteen bishops. We had a long discourse about *lay baptism*, which of late hath made such a noise about the town. We all agreed that baptism by any other person, except lawful ministers, ought as much as may be to be discouraged; nevertheless, whoever was baptized by any other person, and in that baptism the essentials of baptism were preserved, that is, being dipped, or sprinkled in the name of the Father, &c., such baptism was valid, and ought not to be repeated." This then was the opinion of the bishops in 1712. This was the substance of their conversation, where the *duo necessaria* had been observed, no baptism, however irregular and uncanonical, was to be annulled or repeated. Archbishop

Tennison proposed to make a public declaration to this effect, and sent the *draught* of it to Archbishop Sharp for his approval. His reply to Tennison's proposal runs in these words: "I had the honour of your grace's letter (with the declaration enclosed) the last night. *I am entireiy of the same sentiments that we all declared we were*, when we had the honour to dine with your grace the last week. But yet, for all that, I can by no means come into the proposal your grace has now made in your letter; in that we should all *declare*, under our hands, the validity of lay baptism. For I am afraid this would be too great an encouragement to the Dissenters to go on in their way of irregular uncanonical baptisms." There was no difference of opinion as to the doctrine regarding lay baptism, but only as to the expediency of a public declaration of that doctrine. What thus passed was the origin of a declaration, which was shortly afterwards proposed to the Upper House of Convocation for the province of Canterbury, and passed that House with only a single dissentient. These matters are treated of by Bishop Burnet as well as Archbishop Sharp, though with some variations.

After this opinion in favour of the validity of lay baptism, unless it can be shown that from 1661 it became a common practice to refuse burial according to the rites of the Church of England to those who had not been baptized by ministers episcopally ordained, or that persons so baptized were directed to be rebaptized by episcopal hands, I submit to the Court that the decision of the Dean of Arches in the case of *Kemp v. Wickes* must be confirmed. In that decision we have the true meaning of the word "unbaptized;" Sir John Nicholl has put upon it the proper ecclesiastical construction. That construction is borne out, not only by the authorities to which he refers, but by every work of character written on this subject since his judgment was delivered. It is, therefore, for the defendant to show that this child, Elizabeth Ann Cliff, having been baptized with water, in the name of the Father, of the Son, and of the Holy Ghost, was not so baptized as to entitle her to the rites of Christian burial. But I submit that it is fully established, on the part of the promoter, that when lay baptism is once performed, it cannot be repeated; that it admits a person into communion with the Church of England, and entitles him to the rites of that Church.

SATURDAY, JANUARY 30th.

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Dr. *Nicholl*.—This is a proceeding against the Rev. Thomas Sweet Escott, for refusing to bury the corpse of the infant child of two of his parishioners, that child having been born in the parish, and having died in the parish, and having been sprinkled with water, in the name of the Father, of the Son, and of the Holy Ghost, by a person not episcopally ordained, nor having an authority or licence from the diocesan. We do not rely on the fact that the child was dangerously ill when it was so sprinkled. I use the word “sprinkled,” not because I have any doubt the word baptized would be the proper expression; but because, if I did use it, it would seem to be a *petitio principii*.

That the element and the orthodox words were used is proved by Sarah Cliff, by Mr. Balley, and by Mr. Cliff. It is proved by Mr. Bond that Mr. Escott was informed that the child had been baptized by a Wesleyan minister, and that Mr. Escott refused to bury it. It is proved that Mr. Escott was so informed both before and when the child was brought to the church-yard, and that he refused to bury it on the express ground that it had been baptized or sprinkled by a Dissenter. We assert, that in so refusing, Mr. Escott committed an offence against the laws of the land,—against the laws, canons, and constitutions ecclesiastical of this realm, and that the sixty-eighth Canon points out to him his duty. [Here Dr. Nicholl read the canon].

The “convenient warning” being given, and the refusal to bury, have been proved. The meaning attached at the time to the words of the canon—“denounced excommunicate”—is shown by certain articles of inquiry issued in 1604 by the Bishop of London, a copy of which is preserved in the Library of the British Museum.

One of these articles is, “Whether any notorious recusant, who “obstinately refuses to be partaker with the Church of England in “public prayer and hearing of the Word of God preached, who is, “for his disobedience and contempt, excommunicated, and dieth

"excommunicate, be buried in Christian burial, not having before his death sought to be absolved, and testified the same his sub-mission to some honest discreet man who shall upon his oath signify to the bishop of the diocese, whereby his lordship may give order to the ordinary before whom he was excommunicate, for his absolution." This article clearly shows, that the excommunication was at the time understood to be before an ordinary, that is, after judicial sentence. And in a case of smiting in a church-yard, (10 Eliz. Dy. 275), the Court of Queen's Bench held, that even excommunication *ipso facto* ought to be declared in the Spiritual Court, "the excommunication ought to appear judicially, otherwise there can be no absolution."

As to the law of burial our position is, that by the general law every person dying within a parish is entitled to be buried in the church-yard of that parish. That this is a right by the common law and custom of England, enforceable by mandamus or information, Degge, p. 1, c. 12. In the case of *The King v. Coleridge*, 2 Barnwall & Alderson, 806, Lord Tenterden speaks of it as a common law right. That by the Ecclesiastical law *prima facie* every person dying within the precincts of a parish, is entitled to be buried in the church-yard, with Christian rites: the sixty-eighth canon so requires; that, accordingly, the Liturgy provides a service, with a rubric forming part of the statute law of the realm, which directs, that "the priest and clerks meeting the corpse at the entrance of the church-yard, and going before it, either into the church, or towards the grave, shall say or sing" as is there set forth, that is, shall so do in all ordinary and unexcepted cases. Such is the general law. In the same rubric, however, and forming, as we admit, part and parcel of the same law, there are three exceptions; but, inasmuch as these exceptions restrain and limit the general law, and are in the nature of disqualifying exceptions, depriving the party of a valuable right, they are to be construed strictly. The first of these exceptions is, persons who have laid violent hands upon themselves. It is quite clear that this does not apply to the present case.

The second exception is that of persons excommunicate. Now excommunication is the cutting off from the unity of the Church a person who had previously been a member of the Church. This is quite evident from our articles. Then, unless this child was

validly admitted into the Church by baptism, the only mode of admission into the Church known to our law, it could not be excommunicated. You cannot turn out of the Church one who has never been a member of the Church.—Fleetwood, p. 518.\* But moreover, when the canons declare that parties are excommunicated *ipso facto*, the canonists are unanimous in requiring that there must be a declaratory sentence, or at any rate that the fact must be notorious, Gibson, 1049; Wheatley, c. 12, sec. 1, citing Lyndwood. It is not pretended that there was a sentence. Was the fact so notorious? Certainly not—for even now it has not been expressly asserted that this child was excommunicated? The Toleration Act, according to Lord Mansfield, in the Chamberlain of London's case, exempts Dissenters from all ecclesiastical censures for non-conformity; excommunication is a spiritual censure, therefore this child was not excommunicated. I shall then for the present assume, that the child in this case does not come within either of these two exceptions—it was neither *felo de se*, nor excommunicate.

The last exception is that of persons unbaptized, and the whole case depends on what is the true meaning and construction of that word in the rubric prefixed to the burial service. I venture to define an unbaptized person to be, one in whose case any one or more of the essentials of a valid baptism has or have been omitted. Then the question is—What are the essentials of a valid baptism? Both sides agree that water, and the invocation of the Holy Trinity, are essential parts of baptism:—“Water, wherein the person is baptized, in the Name of the Father, and of the Son, and of the Holy Ghost.”

“Go ye, therefore, and teach all nations, baptizing them in the Name of the Father, and of the Son, and of the Holy Ghost,” was our Saviour's command. But it is contended that this command was confined to the Apostles, and their successors, or those acting under their authority. Again, we admit that, as a matter of order, of regularity, and of decent administration, this is so; but the question is—(I am speaking now of the law of the Church of England)—is a minister of the essence of baptism?—so that, if a minister be not a party to a baptism, not only the persons procuring

\* “It would be a great absurdity to excommunicate a person that had no right to Church communion; and he who is not baptized has certainly no right to Church communion.”—Fleetwood, ubi sup. and p. 556.

the baptism, and the person who performs the baptism, are punishable, but the recipient of the baptism is not brought within the pale of the Church—the baptism itself is null and void. Mr. Escott so asserts; his defensive plea in substance maintains, that this child was unbaptized, because it was not baptized by a minister episcopally ordained—we admit that Mr. Balley is not a minister episcopally ordained, nor a lawful minister within the meaning of the rubric. We deny, therefore, that a lawful minister is essential to the validity of baptism. This leads immediately to the great question of the validity of lay baptism. I presume no attempt will be made to contend that, even though lay baptism is good, schismatic baptism is bad. For it is clear, as stated by Dr. Waterland, a great opponent to lay baptism, that the only ground on which, in the early ages, it was contended that baptism by a schismatic priest was bad, was that by schism the minister lost his orders, and that thereby his baptism became a lay baptism. Therefore, the objection was not that schismatic baptism was bad, *qua* schismatic baptism, but *qua* lay baptism. This objection, it appears, was overruled in the Council of Arles, A. D. 314, (10 Waterland, 128); and in the Council of Nice, A. D. 325, (10 Waterland, 128-9). Dr. Waterland says, vol. x., p. 6,—“I know that irregular heretical baptisms were allowed to be valid, both before and after St. Cyprian’s time, though he and other bishops differed in their judgment and practice in that point from other Churches, and appealed to ancient custom in defence of themselves.” A little further on he says,—

“ These heretical and schismatical baptisms were not lay baptisms, or, if they were, those very Churches that allowed them to be valid would have annulled them. They were administered by men of a sacerdotal character, and, on that account, were reputed valid.” Again, “ The question in those times was, not whether lay baptisms were null, both sides supposing that as an undoubted principle; but, whether heresy and schism nulled orders, and reduced heretical priests to mere laymen. It was at length determined in the negative: and therefore the baptisms of heretical or schismatical priests, or deacons, if administered in the name of the Trinity, were received as valid, having all the essentials of baptism, water, commission, and form.” This passage, it is true, goes to establish the invalidity of lay baptism; but

that is not the point on which I am now arguing. What it establishes is this, that schism, *per se*, does not affect the validity of baptism administered in the orthodox form.

In "Poole's Life and Times of St. Cyprian," page 383, the Court will find what the law of the Church was said to be, as ascertained at that time. Mr. Poole says, "The Church's judgment, in "a few words, was this: that all who had been baptized by schismatics and by heretics, *who used the words of the divine institution and in the true sense*, should be received into the Church by "chrism and imposition of hands, after due penance and a renunciation of their errors; but that the baptism of those heretics "who used not the words of the institution, or who so used them as to "deny the Trinity, should be repeated. Rome at present teaches, "that the baptism even of Jews, infidels, and heretics, in cases of "necessity, is valid."

Again, at page 385, Mr. Poole states it as the final decision of the Church, "That a distinction was to be made between heretics "and schismatics; and that the baptism of the latter was to be admitted as *valid*, though by no means as *lawful*; as carrying with "it a *springing* efficacy, so to speak, and as not therefore to be "repeated, but to be *perfected and sanctified* by imposition of hands "by a Catholic bishop: and that the baptism of those heretics who "were orthodox in respect of the Trinity and used the words of "Christ's institution, was to be accounted of in like manner; but "that on the other hand, the baptism of those heretics who denied "the Trinity, and, without all manner of question, of those who "baptized not in the name of the Trinity, was to be accounted no "baptism at all; and that they who were converted from such "heresies were to be received by baptism into the Church, as if "they had been Jews or Pagans;—this is the decree of the Church "Catholic."

It is clear from this, that *qua* schismatic baptism, the Church Catholic held the baptism perfectly good: nor can I find a trace that the Church of England ever questioned the validity of schismatic baptism. The whole question turns upon this—whether lay baptism is good.

This is precisely and identically the same question as was raised in *Kemp v. Wickes*; and why has it not been raised in this case in the same mode in which it was then raised? In taking the question

early in the proceedings, raising merely the bare question of law, a far more speedy decision would have been obtained, and much unnecessary expense, and, what is infinitely more important, much unnecessary irritation would have been avoided. In *Kemp v. Wickes* the learned judge said, " This is certainly the proper stage " of the cause for taking the decision of the Court upon the point " of law ; for, if the facts when proved should constitute no offence, " it will only be involving the parties in unnecessary litigation, and " keeping alive unnecessary animosity, if they should go on to the " proof of these facts. If, on the other hand, the facts are true, " and the defendant has, through ignorance of the law, or other- " wise, violated its injunctions, it is his shortest way to admit the " facts, and to submit to the legal consequences." Had my learned friends done that, this case—in this Court, at least—would have been brought to a decision long before this time. And, in whatever way the decision of this Court might have been given, the law probably would have been finally determined by this time, by the decision of the highest judicial tribunal known to the ecclesiastical laws of this realm.

This question is one of vital importance to the dissenting body. If their baptism is null, they are unchristianized ;—they are not entitled to Church communion while living ; when dead, they are not entitled to Christian burial ; they are not members of the Church of Christ ; they are not children of God ; they are not inheritors of the kingdom of heaven, according to the doctrine of the Church. But if it is necessary that a person, to have valid baptism, must be baptized by a minister episcopally ordained, there is not a member of the Presbyterian Church in Scotland who is a Christian ;—all our fellow subjects in that country, except those belonging to that pure little Church—the Protestant Episcopal Church in Scotland—are unchristianized. This extends also to the whole of Protestant Germany ; for there is not, throughout that country, a single Protestant bishop legally and lawfully consecrated ; and every person who has been baptized by a minister of the Protestant Church in Germany, according to the position taken up by my learned friends, is not a Christian. These are fearful consequences, extending far and wide. If burial is to be refused, is marriage to be refused ? Does not the ritual of marriage as clearly point to a marriage between Christians, as the form of burial service does to its performance over the dead bodies of Christians ? I do not mean to

say it affects the validity of marriage ; but, I say, if persons thus baptized are not Christians, the ministers of the Church of England may well entertain scruples as to marrying them. Are persons who are not Christians to be conjoined in the Name of the Father, and of the Son, and of the Holy Ghost ? Is the rubric of marriage to tell such persons that it is convenient for them to receive the Holy Communion at the time of their marriage ? Consider how far this position, that these persons are to be considered unbaptized, necessarily leads. It applies to the rich and to the poor,—to the high and to the low,—to the poorest cottager in the realm,—and to the illustrious scions of the houses of Mecklenburgh Strelitz, Saxe Meiningen, and Saxe Coburg. Will the vicar of Gedney refuse to receive these persons into Christian communion with the Church while living ?—will he refuse to perform over them the sacred rites of the Church when dead ? Has there been a single marriage of the sovereign of this country since the time of James II., in which both of the parties have (according to this doctrine) been Christians ? What becomes of the Christianity of Bishop Butler ?—of Archbishop Secker ?—of George III., who was baptized by Archbishop Secker ? No man will pretend to say that a person can be admitted to the office of priest in a church of which he is not even admitted a member, and if not a priest then could not Archbishop Secker validly administer baptism according to my learned friend's position.

On the other hand, however, though this is a question of such vital importance in this respect, it is not, I submit, a question of fundamental importance as a point of doctrine and discipline. Bishop Van Mildert, in 1823, when Bishop of Llandaff, edited the works of Dr. Waterland ; and, prefixed to that work, he gives a review of the author's life and writings. In reference to a correspondence on the subject of lay baptism, between Dr. Waterland and Kelsall, he says, “ on a point not absolutely of fundamental importance, to “ espouse, on the one side, the opinions of such men as Lawrence, “ Brett, Leslie, and Waterland ; or on the other, those of such “ opponents as Bingham, Burnet, Kennet, and Kelsall ; can hardly “ be deemed discreditable to either party. We know that great “ and good men have differed, and still differ, from each other, on “ this point, without any diminution of mutual respect, or any intention- “ al deviation from the doctrine or discipline of the Church.”\*

\* Waterland's Works, vol. i. p. 297.

These words are well worthy of attention, as showing that, in the opinion of this great and good man, this is not a question of that fundamental importance which justifies the excitement and alarm felt with respect to it.

Is then lay baptism valid or invalid according to the law and practice of the Church of England? It is not my intention to enter into any research as to what was the practice of the Church in the earlier ages of Christianity. It is admitted on all hands that Tertullian, in the second century, A.D. 192, was in favour of the validity of lay baptism. The Council of Eliberis, A.D. 305, was in favour of lay baptism; and, A.D. 400, St. Augustin, and the whole Catholic Church at that time, were also in favour of lay baptism. But it is enough for me to know, not merely on the admission of my learned friends, but on the admission of all parties, that for many centuries previous to the Reformation in this country lay baptism was permitted—nay, to a certain extent, was enjoined. That after the Reformation, and up to the year 1604, according to my learned friends, it was tolerated; according to my notion it was more than tolerated—it was in certain respects enjoined. I shall not cite the authorities as to the validity and legality of lay baptism in this country previous to the Reformation. They are to be found in the decision in the case of *Kemp v. Wickes*, 3 Phillimore, 280.

The Liturgies of Edward VI., in 1548 and 1552, contain injunctions to the same effect. Those Liturgies, according to the authority of a person of very great eminence and learning in the Church—Dr. R. Laurence, late Archbishop of Cashel—were founded upon the Ritual of Cologne;\* and that which he quotes from the Consultations of Herman † is very nearly to the same effect with our rubric of 1548 and 1552, which was confirmed without alteration in this respect in the time of Elizabeth. About the same time, and by the same persons, the articles were framed; Fleetwood, p. 547. At any rate, the two were co-existent. It being then *è concessis* that, up to 1604, lay baptism was tolerated, those who framed the Twenty-third Article in 1562 could not have put that construction on it which it is now attempted to affix upon it—namely, that to the administration of the sacrament of baptism a lawful minister is

\* *Doctrine of the Church of England upon the Efficacy of Baptism*, 3rd edit. Oxford. 1838. Appendix, pp. 111, 113.

† *Vide Bampton Lectures*, p. 379, edit. 1838.

essential. If it could not receive that construction then, it cannot now.

I admit that, if the alteration in the rubric in 1604, to which I shall presently refer, makes a "lawful minister" an essential part of baptism, we must resort to the articles, and to the rubric, to ascertain what a "lawful minister" is; and, under them, I admit a "lawful minister" is a minister episcopally ordained. But I now argue that the articles, made in 1552 and reviewed in 1562, when they say—"It is not lawful for any man to take upon him the office " of public preaching, or ministering the sacraments in the congre- " gation, before he be lawfully called, and sent to execute the same," could not *per se* have been intended to render the administration of baptism by a layman invalid or null, inasmuch as, at the time that law passed, another law (the rubric of 1548 and 1552, reviewed in 1559) passed *in pari materia*—(not only at the same time, but passed by many of the same persons)—by which lay baptism was tolerated, was allowed, was almost encouraged and enjoined, and which required the ministers to give their flocks instruction as to the fashion in which they should administer baptism.

Now let us look at the Liturgies. The rubric, which we find in Cardwell, "Of them that be baptized in private houses in time of " necessity," is this:—"And also they shall warn them, that with- " out great cause and necessity they baptize not their children at " home in their houses; and when great need shall compel them so " to do, that then they minister it in this fashion: First, let them " that be present call upon God for his grace, and say the Lord's " Prayer, if the time will suffer; and then one of them"—clearly not requiring a 'lawful minister'—"shall name the child and dip him " in water, or pour water upon him, saying these words—'I bap- " tize thee in the Name of the Father, and of the Son, and of the " Holy Ghost.' And let them not doubt but that the child so bap- " tized is lawfully and sufficiently baptized, and ought not to be " baptized again in the Church. But yet nevertheless, if the child " which is after this sort baptized do afterwards live, it is expedient " that he be brought into the Church, to the intent that the priest " may examine and try whether the child be lawfully baptized or " no. And if those that bring any child do answer that he is al- " ready baptized, then shall the priest examine them further." What is this further examination? First, he is to ask by whom the

child was baptized. That was not, at that time, an essential to the validity of baptism. Secondly, he is to ask who was present when the child was baptized. That was not essential to the validity of baptism. Thirdly, the priest was to ask whether they called upon God for grace and succour in that necessity. That, again, was not essential to the validity of baptism; and this is not questionable or doubtful, for the Church has expressed its judgment by expunging this question from the subsequent rubrics, and it forms no part of the rubric at this time. Then come the questions which relate to what were then considered essentials, so that at least the order in which the questions come in our present rubric does not afford proof that the lawful minister is essential to valid baptism; for the order was the same when it is admitted his ministration was not considered essential. The priest is then to ask,—“With what matter “was the child baptized? With what words was the child bap-“tized? Whether think you the child to be lawfully and perfectly “baptized?” This again, being an immaterial question, was omitted from the rubric in 1661. “And if the minister shall find by the “answers of such as bring the child, that all things were done “as they ought to be; then SHALL HE NOT christen the child “again, but SHALL receive him as one of the flock of the true Chris-“tian people.” It is clear, then, that, at this time, the rubric did not only tolerate lay baptism, but in some circumstances it almost required it. “Let one of them that be present call upon God; “and let one of them name the child.”

But it is said that a canon in 1575 absolutely forbids the administration of baptism by a layman. This canon, which is set forth in Wheatley,\* absolutely prohibits any but a “lawful minister” from ministering baptism. But even this canon does not say that baptism administered by a layman shall be null; and I shall show the court that at this very time—even if this canon was valid and existing—lay baptism was not considered null. Much stress was laid upon this canon in debating the responsive allegation, though it now seems to be abandoned. This canon was not printed at the time with the rest of the canons. If it was published, it must have been circulated in manuscript. I think even this is very improbable; it is not mentioned by Hooker, or at the Hampton Court conference, nor as far as I am aware by any writer of that day. It probably

\* Chapter 7, Appendix 1.

was suppressed, as not lawful ;—as in direct repugnance to the law of the land—to the rubric, confirmed by statute. The rubric said that “one of those present” should baptize. That had been the practice of the Christian Church for above eleven hundred years, to that time ;—that was the law in the rubric, and the bishops could not alter that law. Again, this canon could not be binding on the laity, because it was made in a convocation in which the laity were not represented. But this canon was not legal, because it was not made in the only way in which it could legally be made, even if it were not an alteration of the law. The preface to the Book of Common Prayer at that time shows what really was the power of the bishops. The preface to the Liturgies of Edward VI. runs thus,\*—“And forasmuch as nothing can be so plainly set forth, but “doubts may arise in the use and practice of the same ; to appease “all such diversity (if any arise) and for the resolution of all doubts, “concerning the manner how to understand, do, and execute, the “things contained in this book ; the parties that so doubt, or di-“versely take any thing, shall alway resort to the bishop of the “diocese, who by his discretion shall take order for the quieting and “appeasing of the same ; so that the same order be not contrary to “any thing contained in this book. And if the bishop of the diocese “be in any doubt, then may he send for the resolution thereof unto “the archbishop.” Now, in the first place, the passing this canon was an excess of their power, because it was an attempt to alter the law, and to make an order contrary to something contained in the Liturgy. Therefore on that ground it was unlawful.

Next, this canon was not lawful, because (if a doubt existed on the subject) it was not made in pursuance of the method appointed for resolving doubts. The power given was to be exercised upon the application and resort of persons who diversely took anything contained in the Book of Common Prayer. It was to be exercised, not by the bishops collectively, but by the bishop of the diocese individually, subject to an appeal—to a resort to the archbishop—in case of further doubt. Could this canon be sustained under this power given in the preface to the Book of Common Prayer? Are not the fifteen judges of the land appointed by our constitution the interpreters of the law? Can the fifteen judges

\* Cardwell's Two Liturgies, p. 3.

of their own mere motion, assemble together in conclave, and without hearing arguments, or being called upon for a decision, send forth an authoritative decision upon a point of law ? I apprehend they have no such authority ; that the assumption of such a power would be illegal ; that their decision would not be binding. They can only decide upon points raised before them in contested cases, by parties coming before them, and subject to such appeal as the law allows. So in this case, I say it was utterly illegal for the bishops of the land, under this power, to meet together, and send forth an authoritative declaration of the law of the Church. Therefore this canon is illegal ; and on this ground probably was suppressed.

But even if this canon was in existence, it was not considered as declaring lay baptism null and void. In 1584, a request was made to Archbishop Whitgift, that " all baptizing by midwives and " women, which was a cloke of Popery, and was first used by he- " retics, and condemned by the ancient fathers, may from hence- " forth be inhibited, and declared void ; and that no bishop or any " of their officers, in admitting of midwives, might give them any " such authority to baptize as had been heretofore accustomed ? " The answer of Whitgift was to this effect :—" It is a question " whether it be lawful for women to baptize or not. Some of the " most learned writers are of opinion that it is lawful for them so " to do. But that the baptism ministered by women is lawful and " good, howsoever they minister it, whether lawfully or unlawfully, " so that the institution of Christ, touching the words and the " element, be duly used, no learned man ever doubted."—(Strype's Life of Whitgift, Vol. III. p. 139, edit. 1832.) It must be remembered that, at one time, even when the validity of lay baptism was undisputed, there was some doubt whether baptism by women could or could not be allowed or tolerated ; and there are some decrees of councils which pronounce that women shall not baptize, clearly inferring, as is well observed by Kelsall, that laymen might baptize. But here, in 1584, nine years after the supposed canon to which I have alluded was issued, twenty years only before the alteration in the rubric, not only is it quite clear that baptism by women, even if inhibited, was not considered to be null,—and *a fortiori* that lay baptism generally was not considered null,—but

here is a peremptory refusal to declare that it shall for the future be null.

But what was the state of things at this time? In 1572, or thereabouts, there had sprung up a controversy on this subject (Fuller's Church History, vol. ii. p. 503) between Thomas Cartwright, a great Puritan leader, and Dr. (afterwards Archbishop) Whitgift. In the 10th volume of Waterland's Works, page 67, we find Archbishop Whitgift using this language:—"Whereas you say the priest is one of the chief parts, and as it were the life of the Sacrament; in so weighty a cause, and so great a matter, it had been well if you had used some authority of Scripture, or testimony of learned authors; for so far as I can read, the opinion of all learned men is, that the essential form, and as it were the life of baptism, is to baptize in the name of the Father, and of the Son, and of the Holy Ghost; which form being observed, the sacrament remaineth in full force and strength, by whomsoever it be administered." What, on the other hand, was the tone and temper of those who took part in this controversy on the other side. In Fuller (vol. iii. page 100) it is set forth that in 1588 the Dissenters had a Synod at Coventry, when the questions brought forward were resolved in manner following:—1st, their great point was, that private baptism is unlawful: 2nd, that it is not lawful to read homilies in the church: 3rd, that the sign of the cross is not to be used in baptism: 4th, that the faithful ought not to communicate with unlearned ministers, though they may be present at their services: 5th, that the calling of bishops is unlawful, &c. Cartwright was a party to these extreme resolutions.

Thus, then, there was a controversy on the validity of lay baptism in 1572; in which the validity was maintained by one who was shortly afterwards made Archbishop of Canterbury, and the invalidity by one who was the head of the Puritan party. A canon in 1575 prohibited the administration of baptism except by lawful ministers, but did not declare such baptisms invalid; and in 1584, an application to declare baptism by women null was rejected by the archbishop. Notwithstanding all this, this express prohibition by the canon, notwithstanding this subsequent application from Cartwright to have the baptism of women declared null, and this refusal by Archbishop Whitgift, notwithstanding that all this must have been fresh in the memory of the archbishop at the Conference at

Hampton Court, the rubric, which, it is said, was to make so great and important an alteration in the ancient law of the Church, an alteration, whereby (in opposition to the opinion maintained in a public controversy by the Archbishop of Canterbury, and in accordance with that maintained by the champion of a party holding such extreme opinions as were avowed and promulgated by the Synod of Coventry) baptism by any other than a lawful minister was thenceforth to be actually invalid, null, and void; that rubric, not merely does not declare such baptism null, but actually does not, in terms, prohibit it. There is no express prohibition in the rubric of 1604. At the Conferences, it appears that King James objected to the practice; the bishops maintained it, one of them asserting that to deny private persons to baptize in case of necessity, were to cross all antiquity and the common practice of the Church. King James remarks, that he utterly dislikes all rebaptization, even of those whom women or laics have baptized. An alteration was agreed to be made, by the insertion of the words "curate or lawful minister," "which was not so much stuck at by the bishops".—(Cardwell, Conferences, p. 176.) Fuller (vol. iii. p. 176) says, "The result was this, to consult whether in the rubric of private baptism, which leaves it indifferently to all, these words 'curate or lawful minister' might not be inserted."

Now, I ask, could they who just before had maintained that to forbid lay baptism—to declare it invalid—were to cross all antiquity, could they have meant, by the alteration they then made, absolutely to declare lay baptism invalid and null? Instead of an express declaration of the nullity and invalidity of such baptism, or an express prohibition, there are mere affirmative directory words; or rather, words assuming that the lawful minister will be the person to use the element and the words. And this, though the precedent of a former express prohibition in the canon of 1575, and the necessity of a declaration of nullity, must have been within their knowledge and recollection at the time. It is clear they could have had no such intention. It is manifest that James I. had no such intention, for he "utterly disliked rebaptization." But, if they did not so intend, can it, in this case, be said, according to any ordinary principle of construction, that the law is to be so construed? Affirmative words in a statute do not abrogate the common law.

Bacon,\* under the head of "Statutes," says, "Some statutes are "called affirmative; some negative statutes. It is a maxim of law "that an affirmative statute does not take away the common law." And it does not affect a previous statute. Does an act directing a thing to be done by a particular person, or at a particular time, or in a particular manner, render an act not so done void? The canon which requires churchwardens to be elected in Easter week is absolute and imperative; it is irregular to elect them at other times, but if the election takes place, it is valid and good. The statute ordering quarter sessions to be held in certain weeks at four periods of the year, is peremptory in its requirement; but though it is irregular to hold quarter sessions at other times, the adjudications at such sessions are valid. Before the Marriage Act, marriages were required to be performed by a priest *in ecclesia*; the priest himself was punishable for performing a clandestine marriage, the parties present were *ipso facto* excommunicated, and yet the marriage was perfectly valid.

Then again, Bacon† says, "The intention of the makers of a "statute ought to be regarded in the construction of the statute. "Such construction ought to be put upon a statute, as may best "answer the intention which the makers had in view. Great re- "gard ought, in construing a statute, to be paid to the construction "which the sages of the law, who lived about the time or soon "after it was made, put upon it. It is, moreover, a maxim, that "contemporanea expositio est fortissima in lege."

What then was the alteration made in 1604? First, I deny it was legally made. It was made by James the First's own authority, and was never confirmed in Convocation, or by act of parliament. Does it, on its face, *per se*, imply any intention to alter the law, and make a minister essential to baptism? The alteration was such as made the rubric run thus:—"First, let the lawful "minister, and them that are present, call upon God, and say the "Lord's Prayer, if the time will suffer. And then, the child being "named by some one that is present, the said lawful minister shall "dip it in water, or pour water upon it, saying these words." Thenceforth, I am ready to admit, the rubric for the regular ministration of private baptism required a "lawful minister;" but the

\* Bac. Abr. tit. Statute (G.)

† Bac. Abr. Statute (I. 5.)

question is, whether baptism otherwise administered was invalid, null, and void?

The questions directed to be asked by the rubric of Edward VI. run in this order—"By whom the child was baptized? Who was "present? Whether they called upon God for grace and succour "in that necessity?" The introduction of the words "lawful minister" into this rubric, was calculated perhaps to throw some ambiguity upon the face of the rubric. What did those who made the alteration do to obviate this doubt? The third question, "Whether they called upon God for his grace," was omitted; and instead, these words were for the first time inserted, "Because "some things essential to this sacrament may happen to be omitted "through fear or haste, in such times of extremity; therefore I "demand further of you, With what matter was this child bap- "tized? With what words was this child baptized?" It is contended that the intention of this rubric was to make a great alteration in the law of the land, and in the law and practice of the Church, which had subsisted for 1200 years. A lawful minister was not previously essential to a valid baptism. It is said that the persons who made the alterations intended to declare that he should thenceforth be essential to the validity of baptism; that thenceforth those baptisms which had thitherto been accounted valid were to be held invalid. It was to be expected that they would have taken especial care to make their meaning clear beyond the possibility of doubt. What did they do? Did they take steps to prevent the people from being deceived, and from going on in their erroneous practice? No. But they give the words exactly in the old arrangement; and after the two first questions they expunge one, and in the place of it introduce, for the first time, a passage which necessarily and emphatically implies that neither of the previous questions relates to things essential; and that the succeeding questions only refer to such essentials. Surely this was a very strange mode of proceeding, if their intention had been to alter an old law, to abrogate an inveterate practice. No men could have taken more pains to defeat their own object.

But they do not stop here. The conclusion of the rubric of Edward VI. was in these words: "But if they which bring the infant "to the church do make an uncertain answer to the priest's ques-

“tions, and say that they cannot tell what they thought, did, or  
 “said, in that great fear and trouble of mind (as oftentimes it  
 “chanceth); then let the priest baptize him in the form above  
 “written concerning public baptism, saving that, at the dipping of  
 “the child in the font, he shall use this form of words: ‘If thou  
 “be not baptized already, I baptize thee in the name of the Father,  
 “and of the Son, and of the Holy Ghost.’” There is here no  
 reference to what are essentials. Nothing to define what are the  
 points on which, the answers being uncertain, the hypothetical bap-  
 tism is to be ministered; it does not specify whether it is only in  
 case of the answers being uncertain as to the use of the element  
 or words, that the hypothetical baptism is to be ministered; the  
 rubric is general, “if they do make an uncertain answer to the  
 “priest’s questions.” But how stood the rubric after the alteration  
 made by James? Then, the hypothetical baptism is directed only  
 to take place in case the answers are uncertain on two points, *viz.*  
 the use of the element and of the words; and there is no such  
 direction in case it should appear that the rite had not been per-  
 formed by a lawful minister. The rubric of James is in these  
 terms: “But if they which bring the infant to the church do make  
 “such uncertain answers to the priest’s questions, as that it cannot  
 “appear that the child was baptized with water, in the name of the  
 “Father, and of the Son, and of the Holy Ghost (which are essen-  
 “tial parts of baptism), then let the priest baptize it in the form  
 “before appointed for public baptism of infants; saving that at  
 “the dipping of the child in the font, he shall use this form of  
 “words: ‘If thou art not already baptized, I baptize thee in the  
 “name of the Father, and of the Son, and of the Holy Ghost.’”  
 I pray the Court to mark, that the former rubric applied generally  
 to all the questions; but, when they have rendered it ambiguous  
 by the introduction of the words “lawful minister,” then to guard  
 against the people being misled, they first put in the words “Be-  
 “cause some things essential to this sacrament may happen to be  
 “omitted through fear or haste, in such times of extremity,” imme-  
 diately before the two things which are admitted by all to be essen-  
 tial to baptism; and then again, in the concluding rubric, for the  
 very purpose of further guarding against ambiguity, they state that  
 if it “cannot appear that the child was baptized with water in the

" name of the Father, and of the Son, and of the Holy Ghost, "*which are essential parts of baptism,*" the ceremony shall be again performed. Can a doubt exist that these words, " which are essential parts of baptism," were here inserted for the very purpose of demonstrating that the minister, though a regular, was not an essential part of baptism? And yet it is said, that in thus doing they intended to alter the law and practice of the Church, which had subsisted for 1200 years, and without any public notification, except mere affirmative words, to declare that invalid and null, which had been tolerated, nay enjoined, up to that moment.

But did the matter rest here? At that time a body of canons was published by the Convocation—the canons of 1603. Fuller says (vol. iii. p. 203), " Many canons were made therein" (*i. e.* in the Convocation), " Bishop Bancroft sitting as president," he being one of the stoutest maintainers of the validity of lay baptism. " Take this as the result thereof, a book of canons was compiled, " not only being the sum of the queen's articles, orders of her " commissioners, advertisements, canons of 1571 and 1597, which " were in use before, but also many more were added."

In this new code, embodying many of the old canons, there is not a single one analogous to the canon of 1575: not one single one intimating to the people that that which had been hitherto tolerated and enjoined, would be thenceforward null, invalid, and punishable. And this not in a matter trivial, and of limited interest, but of vital importance, and affecting the mass of the people. All that is said is, that " nothing can be added unto the doctrine of " baptism and the Lord's Supper, as set forth in the Common " Prayer, that is material or necessary." (Canon, 57.) Can it be believed that when these canons were framed and issued, so great an alteration in the ancient law and practice of the Church, if in truth made, would not have been noticed? And yet there is not, in the whole code, the slightest allusion to any such change.

Again. James issues a proclamation for the authorizing an uniformity in the Book of Common Prayer. Does he there indicate that any great change had been made in the law? The proclamation is given in Cardwell;\* and states the results of the Conferences at Hampton Court as follows: " It appeared to us and our council,

\* *Ubi supra*, p. 226.

“ there was no cause why any change should have been made at  
 “ all in that, which was most impugned, the Book of Common  
 “ Prayer ; containing the form of the public service of God here  
 “ established ; neither in the doctrine which appeared to be sincere,  
 “ nor in the forms and rites, which were justified out of the prac-  
 “ tice of the primitive Church. Notwithstanding, we thought meet,  
 “ with consent of the bishops and other learned men there present,  
 “ that *some small things might rather be explained than changed*,  
 “ not that the same might not very well have been borne with,” &c.  
 So it did not require change ; it only needed explanation ; there  
 was no cause for alteration in the Common Prayer Book, “ which  
 “ was most impugned.”

The next important epoch is 1661 : when the Conferences at the Savoy, and the subsequent revision of the Common Prayer Book took place. The objection then taken by the Dissenters :—“ We “ desire that baptism may not be administered in a private place, “ at any time, except by a lawful minister ;”\* clearly infers that, up to that time, it might be administered in a private place, by a person other than a lawful minister. The answer of the bishops is —“ And so do we, where it can be brought into the public congrega-“ gation ; but since our Lord hath said, ‘ Except one be born of “ water and the Holy Ghost, he cannot enter into the kingdom of “ heaven,’ we think it fit that they should be baptized in private, “ rather than not at all. It is now appointed to be done by the “ lawful minister.”† They still resort to the same ambiguity which is found in the rubric of 1604. They do not say that it is invalid if performed by any one but a lawful minister ; but that the regular way of doing it is by a lawful minister.

The alterations made in the rubric at this time were very slight, but the sanction of legislative enactment was added, thus making it of binding authority, and the office “ For the baptism of such as are “ of riper years” was introduced. That office, we are told, in the preface to the Book of Common Prayer, “ although not so necessary “ when the former book was compiled, yet by the growth of anabap-“ tism, through the licentiousness of the late times crept in amongst “ us, is now become necessary, and may be always useful for the “ baptizing of natives in our colonies, and others converted to the

\* Cardwell's Conferences, p. 325.

† Ibid. p. 356.

“ faith.” This plainly shows that the Church of England, in introducing this office, had no thought of baptizing Dissenters anew ; but of baptizing those to whom the rite had not been administered at all. Nothing then appears on the face of the Liturgy and rubric of 1661 to give to the proceedings at that period an interpretation, or assign to them an intention, different from those, which, I have endeavoured to show, properly attach to the proceedings of 1603.

Nor does the language of the divines of our Church in the mean time point to a different conclusion. The opinions of Whitgift, of Bancroft, of Archbishop Abbot, of the University of Oxford, have been already quoted.

Archbishop Laud, it is well known, prepared a rubric and Liturgy for the Church of Scotland. The last rubric of private baptism runs thus\*—“ But if they which bring the infants to the church do “ make such uncertain answers to the presbyter’s questions, as “ that it cannot appear that the child was baptized with water, in “ the name of the Father, and of the Son, and of the Holy Ghost, “ (which are THE essential parts of baptism), let the presbyter “ baptize it.” This clearly shows Archbishop Laud’s opinion.

But “ *contemporanea expositio est fortissima in lege.*” What were the opinions of those who were engaged in the revision of the Liturgy in 1661 ?

Mr. Thorndike, who was a coadjutor in the Conferences at the Savoy, and also in revising the Book of Common Prayer, says, in his “ Rights of the Church in a Christian State,” (Fleetwood, 536) “ Because baptism is the gate as well of the invisible Church as of “ the visible, and because the occasions are many and divers which “ endanger the preventing of so necessary an office by death, in “ this regard the practice of the primitive Church, as alleged by “ Tertullian, must not be condemned, whereby baptism given by “ him that is only baptized, is not only valid, but well done.” This opinion was expressed in 1649, before the Conference. Did he change his opinion after the Conference of 1661 ? In “ Just Weights and Measures,” published in 1662, (Fleetwood, 537), he says, “ As to the sacrament of baptism, the ministering of it may “ come of a deacon, in the priest’s absence ; nay, of a layman, “ rather than that any child should die unbaptized.” Bishop Sparrow, the Bishop of Exeter, and afterwards of Norwich, also,

\* L’Estrange’s Alliance, p. 226.

was one of the coadjutors on that occasion. In Waterland's Works, vol. x. page 73, we read—"Bishop Sparrow could not see  
 " what could be reasonably objected against this tender and mo-  
 " therly love of the Church to her children, who chooses rather to  
 " omit solemnities than hazard souls: which indulgence of her's  
 " cannot be interpreted any irreverence and contempt of that  
 " venerable sacrament; but a yielding to just necessity (which de-  
 " fends what it constrains) and to God's own rule 'I will have  
 " mercy and not sacrifice.' " He says, also, "She permits that a  
 " child may be baptized in any decent place at any time, requiring  
 " in such case the performance of essentials, not of solemnities." He quotes an ancient canon, "He that is baptized himself, may in  
 " a case of necessity baptize, if there be no Church near." The only limitation therefore is, that the person baptizing must be himself baptized. "And to conclude this point," says Mr. Kelsall,  
 " Dr. Fuller (in his Moderation of the Church of England) is of  
 " opinion, that our Church judgeth nothing to be of the essence of  
 " this sacrament, but the invariable form of baptism."

The opinion of Dr. Cosin, also one of those engaged in the revision of the Liturgy, may be found in Fleetwood, p. 539. Writing in 1650 to Mr. Cordel of Blois, he says, "I conceive that the  
 " power of ordination was restrained to bishops, rather by apos-  
 " tolic practice and the perpetual custom and canons of the Church,  
 " than by any absolute precept that either Christ or his apostles  
 " gave about it." According to our own practice up to 1661, episcopal ordination was not necessary to a minister of the Church of England. The preface to the Ordination Service was, however, altered in that year, and since that period no person not canonically ordained "is to be accounted or taken to be a lawful bishop,  
 " priest, or deacon in the Church of England, nor suffered to execute any of the said functions." He afterwards says, "As in the  
 " case of baptism, we take just exception against a lay man or wo-  
 " man that presumes to give it; and may as justly punish them by  
 " the censures of the Church wherein they live for doing that  
 " office which was never committed to them; yet if they once  
 " have done it, we make not their act and administration of baptism  
 " void, nor do we presume to iterate the sacrament after them."

This proves that Bishop Cosin was in favour of the validity of lay baptism previous to the Conferences at the Savoy. The leading

part which he took in the revision of the Prayer Book is stated in Cardwell's Conferences, p. 370. In page 388 it is said, "There is still in existence a book bearing the corrections, and containing minute instructions to the printer. The corrections are in the handwriting of Sancroft, who was then chaplain to Cosin, and who superintended the correction of the press." A letter to Sancroft from one of Cosin's chaplains at Durham shows the great interest which the bishop took in the progress of the Prayer Book under Sancroft's superintendence, "My lord desires at all times to know particularly what progress you make in the Common Prayer."

But, moreover, in the second Appendix to Nicholls's Commentary on the Book of Common Prayer, is printed a scheme of alterations in the liturgy and rubric, which scheme was prepared by Bishop Cosin. It is headed "Particulars to be considered, explained and corrected in the Book of Common Prayer." A marginal note to that appendix at page 67 is in these words:—"Whether or no these following observations were drawn up by Dr. Cosin, before the Restoration of King Charles, or afterwards, upon the last review of the Common Prayer, I cannot say; but this is plain, that these Reviewers had very great regard for these remarks, they having altered most things according as was therein desired; and it is probable that they were laid before the Board, Bishop Cosin being one of the principal Commissioners." Among the observations of Dr. Cosin thus introduced by Dr. Nicholls is the following remark on the then existing office of private baptism:—

"In private baptism."

"In the first rubric the cause of the necessity of baptizing in private houses ought to be expressed as, &c." This suggestion was not adopted.

"In the next rubric the lawful minister is appointed in this urgent cause to baptize the child, which was added by King James, his direction only in the Conference at Hampton Court, to avoid the baptizing by midwives or others, that were no lawful ministers ordained for that purpose. This alteration was well, but it wanted the force of a law according to the act of uniformity prefixed to the book." In a marginal note Dr. Nicholls says, "But this is now confirmed by law." Then comes the following

most important passage, not in the margin but in the text, as one of Dr. Cosin's "Particulars to be considered, explained and corrected." "It is not here said what shall be done in this case, when a lawful minister cannot be found; or whether the child ought to be baptized again or no, when only a midwife, or some other such, hath baptized it before." This point was thus clearly brought under the notice of the commissioners in 1661. The bishops had been asked twenty years before 1604 to declare lay baptism null. That application had been refused at the time. And in 1604 they not only do not declare such baptisms null, but they do not expressly prohibit them—they advisedly pass by this matter. It is now shown, that in 1661 the fact that no provision was made in case of the absence of a lawful minister was brought to their notice and under their consideration. They again pass it over. They say in effect, "We are conscious, according to the ancient law and practice of the Church, a lawful minister is not essential to valid baptism. We cannot, therefore, crossing all antiquity, declare lay baptism null and invalid. If we say anything about it, we shall encourage these irregular and informal baptisms. We must, therefore, leave it in the same obscurity in which we have found it, and in which it has always been left by the public rituals of the Church of Rome."

The note proceeds:—"It is not here ordered whether the child thus suddenly baptized shall have the sign of the Cross upon it, neither then, or when it is appointed to be afterwards brought into the Church." Dr. Nicholls's marginal note is (though not quite correctly), "the use of the Cross is now enjoined in (it should be 'after') private baptism." What did the Commissioners do? They did order the sign of the Cross to be used when the child was brought into the church. They do not define the cause of necessity, they pass over that—and they also pass over, but as it is to be presumed after due consideration, the omission of any direction as to what is to be done in case the child has been only baptized before by "a midwife or some other such;" but they adopt the suggestion, that the sign of the Cross should be used in the Church. Thus, as well as from adopting a large proportion of the other suggestions in this paper, showing that they had it under their consideration. Besides, the interest Bishop Cosin took in the matter excludes all doubt that he would lay his suggestions before them. Surely this

establishes beyond all controversy what were the opinions and intentions of those who revised the Common Prayer in 1661.

The bishops then in 1661 act upon precisely the same principles as the bishops in 1604. They will not cross all antiquity by declaring lay baptism null and void, but they will not hold out any encouragement that it ought to be administered except by a lawful minister.

The matter does not rest here. Some short time after this, Mr. Lawrence, a layman, who was originally baptized by a dissenter—certainly not in the Church, or by a lawful minister—entertaining some doubts of the validity of his baptism, procured himself not to be baptized absolutely anew, but to be conditionally baptized. This is the statement of Kelsall and Bingham. So that even this great advocate for the invalidity of lay baptisms did not feel very confident of their invalidity ; or, if he did so feel, he could find no clergyman who felt so confident of their invalidity as to baptize him absolutely anew without the words, “If thou art not already baptized.” This might have been very innocent ; but not satisfied with this, he thought fit to publish a controversial pamphlet on the subject, in which he threw doubt upon all baptisms not performed by episcopally ordained ministers. This produced great excitement. A great mass of the people, men afterwards in full communion with the Church, had been baptized otherwise during the rebellion, and these he would declare unbaptized, as not Christians, as out of the communion of the Church while living, though I do not find in a single instance a suggestion that they ought to be refused Christian burial when dead. Bingham and others entered into the field in defence of the validity of lay baptism. A long controversy ensued ; the whole of it was limited to the investigation of what had been the practice of the Catholic Church in the early ages. Little was said as to the judgment of the Church of England on this point, except by Fleetwood, then bishop of St. Asaph, who, in 1712, published anonymously a pamphlet, entitled “The Judgment of the Church of England in the case of lay baptism “ and of dissenters’ baptisms.” He goes fully into the rubrics, canons, articles, and practice of the Church of England ; and, by a chain of historical facts and of the closest reasoning, demonstrates that the Church of England had never held such baptisms invalid. The bishops felt that the excitement, the disquiet, and the heart-

burnings which the agitation of this question produced in men's minds rendered longer silence on their part impossible. The Church had hitherto left her judgment in obscurity, because, though she disapproved, she could not absolutely or expressly forbid, still less could she annul, lay or dissenting baptism; for this, as Bishop Bilson said in 1604, would be to cross all antiquity. On the other hand, openly, and publicly, and unequivocally to declare such baptism, valid and lawful, were to encourage irregularity. She had accordingly preferred the wiser course of pointing out in her liturgy and rubric the regular mode, but abstained from expressly forbidding or pronouncing the other invalid and null. This was the course of the Church of Rome. During the whole time she allowed lay baptism, her public rituals seemed to confine the ministration of that sacrament to the priest. (Fleetwood, 525.) From this course, wise, prudent, expedient and safe, the Church of England was now driven by the excessive zeal of Mr. Lawrence and his party. Accordingly, at the annual meeting at Lambeth in 1712, Archbishop Tenison proposed that the bishops should put forth an authoritative declaration on this point. Thirteen of the bishops were present, and they unanimously agreed that lay baptism was valid, and Archbishop Tenison understood they had agreed to put forth a declaration that lay baptism was valid, and accordingly prepared and submitted one to the bishops. Archbishop Sharpe, however, and two other bishops, though agreeing in the validity of lay baptism, objected to put forth such an authoritative declaration, thinking that it would encourage too much the irregular and uncanonical baptism of dissenting ministers, and therefore the declaration was dropped.

The Convocation shortly after took up the matter. The upper house agreed to a declaration, which is to be found in the "Annals of Queen Anne," a book contained in the British Museum, Vol. XI., page 376:—"Forasmuch as sundry persons have of late, by preaching, writings, and discussions, possessed the minds of many people in the communion of our Church with doubts and scruples as to the validity of their baptism, to their great trouble and disquiet, we, the President and bishops, have thought it incumbent on us to declare, in conformity with the judgment and practice of the Catholic Church of Christ, and of the Church of England in particular, that such persons as have been already baptized in or with water, in the Name of the Father, and of the Son, and of the Holy

“ Ghost, though their baptism was irregular for want of a proper “ administrator, ought not to be baptized again.” Bingham, in his dedication to Bishop Trelawney, states, that all the bishops of both provinces were unanimous on this subject. (Epistle dedicatory of Scholastical Hist. of Lay Baptism, p. cxvi. Works, vol. viii.) The lower house refused to sanction this declaration. “ After the “ reading of this paper in the lower house, it was agreed that the “ paper sent down from the bishops should not be considered in the “ present session.” And the reasons assigned for this resolution were—first, that “ The Catholic Church has not determined the “ question of lay baptism synodically,” and second, “ that great in- “ convenience would arise from any determination of it at that time.”

A protest however was entered against that refusal, and that protest was signed among others by Gibson and Kennet, then members of the lower house.

About the same time, Bishop Talbot, the father of Chancellor Talbot, and the patron of Bishop Butler and of Archbishop Secker, delivered a charge, in which he earnestly asserted and maintained the validity of lay baptism,—and as Bishop Talbot was shortly afterwards (in 1721) promoted to the see of Durham, his charge in 1712 could not have given great offence.

From this time the controversy seems almost to have slumbered, nor am I aware that it was taken up with any vigour till about the year 1809, at the time of the judgment in Kemp and Wickes.

Now in the whole course of the controversy of 1712, from first to last, the point of the refusal of burial to persons baptized by dissenters was not raised, as far as I am able to find, or can recollect to have found. It was a thing never dreamt of. I think there is positive evidence that up to the time of Waterland’s second letter, no one had insisted upon it. Dr. Waterland says,\* “ We condemn none abso- “ lutely by this doctrine, but those who are culpable ;—those who “ want true baptism, or at least may suspect they want it, and yet will “ not have it, though it be easy to be had.” He says again,† “ I have “ hinted further, that the doctrine does not necessarily condemn all “ that have lived and died without any other baptism but what they “ have received at lay hands. Indeed it condemns none but such “ as are culpably ignorant of their duty in that respect, or wilfully “ neglect it.” Now, can an infant in the circumstances of the child

\* Works, x. 174.

† Ib. p. 178.

in this case, be said to be culpably ignorant of its duty, or wilfully to neglect it? If so, by that doctrine, it is upon the infants that the sins—if sins they be—of those who have baptized them improperly or irregularly are to be visited. I think then it is quite clear, that Dr. Waterland could not have contemplated that these children would be excluded from burial in the Church, could not have contemplated that they would be excluded from the Church of Christ—that they would not be made heirs of the kingdom of heaven—that they would not be made children of God. It is quite impossible that he, who says he meant to exclude none but those who were culpably ignorant of their duty in this respect, or wilfully neglected it, could have contemplated such results.

Dr. Waterland, however, bears valuable testimony to the judgment and practice of the Church of England on the validity of lay baptism: he says,\* “Upon a careful view of what has been said on both sides relating to the judgment and practice of our Church, “I take the case to be thus: 1. The Church of England has nowhere expressly and in terms determined the controversy either way. 2. Her practice, and the stream of her divines, has all along been against us.” He says again, p. 190, “It does not follow, that because bishops confirm all without distinction, that therefore they know any of them to be unbaptized, but only that they do not know to the contrary. I grant, however, that the practice argues so far that they have in general looked upon it as an indifferent thing, as to the validity of baptism, whether it be by a priest or a laic. Churchmen have sprinkled in baptism now a hundred years, or it may be more, without ever inquiring whether the child be weak, and the rubric in that case is grown obsolete; does it follow from thence, that sprinkling without necessity is according to the sense and judgment of the Church of England?” I think it does necessarily follow,—when we find that the bishops after the Restoration did not require the clergy to give notice to their flocks that they were not Christians if they had not been baptized by lawful ministers,—and when the clergy received persons not so baptized to the Communion of the Lord’s Supper, marrying them by a ritual which presupposed them to be Christians, and not refusing them Christian burial,—it does conclusively follow that “sprinkling,” even not in a case of necessity, is valid according to

\* Vol. x. p. 185.

the sense of the Church of England. "As to making any thing "valid," says he,\* "ex post facto, by a subsequent confirmation, "which was not valid before, it is too romantic a notion to need "confuting, having no countenance from Scripture, antiquity, or "reason, or the principles of our Church, or our office of con- "firmation, which supposes persons confirmed to be validly bap- "tized before." Away then, according to Dr. Waterland, goes the whole opinion that these baptisms, which were not valid originally, were to be made valid by confirmation or ordination, in which offices one of the essentials of baptism certainly is not used.

Bishop Fleetwood seems to have been the only person who saw that the necessary result of maintaining the invalidity was, that Christian burial ought to be refused to those persons who had been baptized by Dissenters. He does not treat it as a thing that had been mentioned before; but as one of the absurdities, the monstrosities, the ridiculous results, which would follow from holding lay baptisms invalid. He uses it as an *argumentum ad absurdum*. "Till I see their lordships (the bishops) refuse to ordain either "foreigners from abroad, or Dissenters at home, without baptizing "them anew; till I hear they refuse to confirm the children of Dis- "senters, who were baptized by Dissenters; till I hear they order "their clergy, both by preaching, writing, and discoursing, to tell "their congregations, that unless they have been baptized by epis- "copal hands, *they are not Christians*, they must not come to the "blessed Sacrament, they ought not to be married by the appointed "form, which supposes both parties to be Christians, nor can they "or ought they, to have Christian burial, the rubric (confirmed by "Parliament and Convocation) expressly excluding unbaptized per- "sons; till I can hear and see this, I will still believe that it is the "judgment of the Church of England, that lay baptism seriously "conferred in matter and form prescribed by Christ, is not to be "reiterated, although it was irregular for want of a proper ad- "ministrator."—(p. 556.)

So the matter has rested pretty nearly, from that time to 1809. In the mean time, however, there are to be found testimonies in favour of the validity of lay baptism from persons of no small authority. Archbishop Wake's Catechism clearly points to water and the invocation of the Trinity, as the only essentials. In Arch-

\* Vol. x. p. 190.

bishop Potter's Works, vol. ii. pp. 236, 237, we find this passage :—  
 “ It is the common opinion, that laymen may lawfully baptize in  
 “ cases of extreme danger. Neither can any instance be produced,  
 “ where this practice was condemned by any council, or so much as  
 “ found fault with by any of the primitive fathers, except, perhaps,  
 “ St. Basil. However, his judgment is less to be regarded, because  
 “ he defends the error of Cyprian and Firmilian,—that is, the  
 practice of rebaptization. The Court will see that Archbishop Potter  
 considered such a practice erroneous; and he adds “ which”—  
 which error, that is, “ had long before been condemned and ex-  
 “ ploded by the Church.” Archbishop Secker and Bishop Butler,  
 themselves baptized by Dissenters, did not procure themselves to  
 be rebaptized on entering the Church. It is impossible to maintain  
 that anything subsequently done could make that baptism which  
 was not at first baptism. Ordination cannot; there is no use of  
 water. The essential is wanting. Neither in Confirmation, nor in  
 any of the other ceremonies of the Church are there, the essentials  
 of baptism,—water and the invocation of the Holy Trinity. Either  
 then Archbishop Secker and Bishop Butler were validly baptized  
 when they were sprinkled by a Dissenter with water in the name  
 of the Father, of the Son, and of the Holy Ghost; or they died  
 unbaptized and were not entitled to Christian burial.

Thus much for authority from some of the most eminent of the prelates of our Church. I am not aware that during the lapse of time since 1604, the general law has undergone any alteration materially affecting this question. There are, however, one or two things which bear a little upon the subject.

The Toleration Act has relieved the Dissenters from ecclesiastical censures; it has relieved them from all pains and penalties, and all ecclesiastical censures, for non-conformity. The consequence is, they are no longer acting in violation of the law.

An act was passed, imposing a stamp duty upon Dissenters' baptismal registers, in common with registers of baptism in the Church of England. Would the legislature have drawn a revenue from that which they considered not merely unlawful and illegal, but absolutely invalid and null. Would they by such an act have sanctioned the practice, if sprinkling with water, in the name of the Father, and of the Son, and of the Holy Ghost, were no baptism? Would they thus be parties to misleading Christ's flock?

Did the legislature ever impose a stamp duty upon Dissenters' marriages? And why not? Because they were illegal and null.

But, above all, the act requiring Popish recusants, not excommunicated, to be buried in the church-yards with Christian rites, is the strongest possible evidence that the alteration of the rubric in 1604 was not intended to render a "lawful minister" necessary to the validity of baptism. It is in vain to tell me that Popish priests are canonically and episcopally ordained. That is not the question. The question is, Is a Popish priest a "lawful minister" within the meaning of the rubric of the Church of England? Away with the nonsense of saying that to constitute a lawful minister within the meaning of the rubric, episcopal ordination alone is necessary. When the law speaks of a "lawful minister," it means a minister of the Church of England, in the same way that when it speaks of churches, chapels, bishops, or dioceses, it means those of the Church of England, those forming part of, or belonging to the National Establishment—those known to the law in that character, and under that denomination. Even in statutes affecting matters purely temporal, where notices are required to be given in churches and chapels, only chapels of the Established Church are included. The enactment is never construed to extend to dissenting chapels or Romish chapels; nor even to proprietary chapels licensed for the performance of divine service according to the Church of England. I say, then, that Romish priests, not being lawful ministers of the Church of England, are not lawful ministers within the meaning of the rubric. If, then, the performance of baptism by a lawful minister is essential to its validity, these Romish recusants had not been baptized; and yet, by act of parliament passed only two or three years after the alteration in the rubric, which is supposed to render a lawful minister essential to the validity of baptism, persons not so baptized are required to be buried with Christian rites in the church-yards of the Church of England, directly in opposition to the ancient law of the Catholic Church, which always refused Christian burial to unbaptized persons. I submit, then, that the decision in *Kemp v. Wickes*, that a lawful minister is not essential to the validity of baptism—that a person sprinkled with water in the name of the Father, the Son, and the Holy Ghost, is not "unbaptized" within the meaning of the rubric, and that consequently a minister of the Church of England is bound to bury a

person so sprinkled, and afterwards dying within his parish, in the church-yard, and with Christian rites—is in conformity with the law and practice of the Church of England.

It is said, however, that a decision, directly opposed to the decision in *Kemp v. Wickes*, was given somewhere about 1809, in the Consistory Court at Gloucester. If that decision were before the decision in *Kemp v. Wickes*, the law which might be laid down has been over-ruled by the decision of the superior Court; if it was since, either the case must have differed in its circumstances, or the judge must have been strangely ignorant of his duty. An inferior Court is not, I conceive, justified in declaring the law to be different from that which had been pronounced to be the law by the superior appellate Court.

Sir HERBERT JENNER.—When was this decision given?

Dr. Nicholl.—About the time of the decision in *Kemp v. Wickes*.  
The *Queen's Advocate*.—I think it was rather later.

Dr. Nicholl.—It is mentioned in the pamphlet of Archdeacon Daubeny. A passage from Dean Comber, incorporated into Wheatley, and thence transferred into Bishop Mant's notes on the Common Prayer, was almost the only authority quoted against the validity of lay baptism in the debate of the allegation. That passage certainly shows that Dean Comber treats such baptisms as irregular and censurable; but it does not establish that he considered them invalid. In his Companion to the Temple, p. 196, under the head “The Administration of Baptism,” he says, “He that doth baptize “ought to be a lawful minister, for Christ gave this commission “only to the Apostles, joining the office of preaching together “with it; so that unordained persons may as well presume to “preach as to baptize; and therefore the Church of old forbade “women to baptize . . . . so that our Church requires it to “be done by a lawful minister. I know there are some allegations “out of antiquity, which seem to allow of a layman to baptize in “cases of great necessity; but there are others of the Fathers who “disallow that practice, and certainly it is a great presumption for “an ordinary person to invade the ministerial office without any “warrant.” What he says here is not that lay baptism is invalid, but that it is better to leave it undone by a layman, because it is presumptuous for such a person to baptize. He proceeds, “and “as to the pretence that a child may be in danger, I suppose the “salvation of a child is as safe upon the stock of God's mercy

" without any baptism, as with a baptism which is not commanded by God, and to which he hath made no promises, so that where God gives not opportunity of a person who may do it aright, it seems better to leave it undone." That it is not to be inferred from these passages, that Dean Comber thought lay baptism was invalid, is clear from a passage at page 182, where, speaking of the "preparation before baptism," he says "Because baptism of old was called illumination, therefore that place of the Apostle of the *once enlightened* hath been usually expounded of those that have been once baptized; and afterwards did apostatize: but besides what is intimated in Scripture, the ancient Church doth positively condemn the repeating of baptism, provided the party were baptized in the name of the Father, and of the Son, and of the Holy Ghost. And whereas the Council of Nice, Can. 19, St. Cyprian and Tertullian speak of baptizing again those who had been baptized by heretics, it was because they esteemed their baptism no baptism, as not being performed in the name of the Holy Trinity according to Christ's appointment; so that it is absurd and impious to do this over again."

And again, "as to those of riper years, it doth highly require their care it to do well. For they cannot (saith St. Cyprian) come to this laver twice or thrice to correct the omissions of the first time—if it be ill done at first, it must remain so for ever."

In the passage I first quoted, where he is speaking of the irregularity, the presumption, the unlawfulness, as far as the administrator goes, of lay baptism, he does not say one word of its invalidity. On the contrary, he calls it "baptism;" and in this latter passage he says, if the child is baptized in the name of the Father, and of the Son, and of the Holy Ghost, not saying by whom ministered, the baptism is valid.

Wheatley, the only other authority cited by the counsel for Mr. Escott in discussing the question whether children baptized by Dissenters are to be buried in the church, advances an argument so monstrous and absurd in itself as to destroy the value of his opinion. His argument is shortly this, you cannot receive evidence of baptism, except from the parish register. Therefore, if you have not the evidence from the parish register, you may consider the child unbaptized, and refuse burial on that ground. Is this sound in reason or in law? It is true the parish register is evidence; but it is not the only evidence, nor the best evidence. The

evidence of any person present at the baptism is equally as good as the production of the baptismal register. This argument, then, is unsound in law; is it sound in reason? A man may die in one parish, and his surviving relatives may not know in what other parish he was baptized, or in what parish he was born. The relatives may be in poor circumstances; and, even if they knew where he was baptized, they may be unable to obtain the certificate from the parish register. The parish register may have been lost, or an omission may have occurred in it. And yet Wheatley says, that on this ground burial may be refused!

On the whole, I submit it is shown that the child in this case was not a person "unbaptized," within the true intent and meaning of the rubric prefixed to the Burial Service;—that the child was not "excommunicated," and it is admitted that it was not "*felo de se*"; and I further submit, that having died within the parish of Gedney, the child was, under these circumstances, entitled to Christian burial. It is shown, that warning was given to Mr. Escott that it would be brought for Christian burial to the church-yard,—that it was accordingly brought,—that Mr. Escott was informed the child had been baptized by a Wesleyan minister, and that he refused to bury it. I submit that such refusal was in contempt of the laws, canons, and constitutions ecclesiastical of this realm, and that Mr. Escott has therefore subjected himself to ecclesiastical censure and suspension. And I further submit, that, inasmuch as this question had been solemnly raised and decided in 1809, and as nothing had fallen from the judge of this, or any other superior Court, to call that decision in question; that, inasmuch as Mr. Escott has not shown or attempted to show, that he resorted for the solution of his difficulty and doubt to his own diocesan; (perhaps he might suppose that his diocesan, being the editor of "*Tertullian*," the first Father who wrote in favour of lay baptism, was not very favourable to his case;) that, moreover, as Mr. Escott did not, by raising the point of law upon the admission of the articles, think fit to obtain at that early stage of the cause, the decision of this Court upon the only question in dispute, when (if so advised) he might at once have taken the opinion of the Court of Appeal, but has kept us in suspense, subjected us to unnecessary delay and expense, and been the means of unnecessarily prolonging heart-burnings and animosities, and of disturbing the public mind; I submit that the Court cannot, in justice to my clients, give its

sentence in their favour, without condemning Mr. Escott in the costs, for raising a question which, I am satisfied, the decision of this Court will show to have been properly determined in 1809; and to have been unnecessarily agitated on this occasion, to the great annoyance of the whole Dissenting body of this kingdom, and, I am fully convinced, of the great majority of the bishops, the clergy, and the laity, of the Established Church.

*Dr. Phillimore.*—It now devolves upon me to reply to the arguments of my three learned friends who are opposed to me; and although I feel that to combat many of those arguments will but be fighting shadows,—though I feel that many statements have been advanced which we have no means of opposing, and that the arguments have been extremely discursive, and have led into topics and subjects upon which it is impossible this Court could—or would wish to—form an opinion, yet there was much in the arguments of my learned friends which I would most gladly follow. But I am aware of the difficulties of my case. I have to contend against a recorded decision of this Court, which my learned friends have strained every means in their power, but without success, to make applicable to the point at issue. I am aware of the weight of that decision. I am aware of the weight which it naturally will have with any judge placed in the seat you now occupy, who is called upon to revise the decision of a predecessor, given thirty years ago. But the Court has an obvious course before it. If the Court adheres to the opinion of its predecessor, and this case is brought within the range of that sentence, of course the decree of the Court will be in accordance with it. But I apprehend if we should be able to satisfy the Court that that decision was erroneous, this Court will act in the same manner as the Court of Queen's Bench, and many other Courts, which have left points in abeyance for fifty or sixty years, and have then decided them contrary to previous adjudications.

This case is one which should be calmly, and temperately, and deliberately argued, and sent for the opinion of a superior Court. It is in vain for my learned friends to argue that the majority of the clergy are on their side, or that in this case we are hostile to the Dissenters. There are many of the clergy who feel themselves bound by their ordination oath, to refuse burial to persons circumstanced as was the child in this case. It is, therefore, extremely

fit that the question should be raised ; and I do not despair of being able to satisfy the Court that, in this case, the Court must come to a judgment in our favour.

My learned friends have cited the strongest possible authorities to prove the propriety of a change in the opinion of this Court. My learned friends cited the case of Lawrence, as an instance of a convert on this subject ; and also quoted the opinion of Dr. Waterland, as being favourable to their clients. Dr. Waterland, however, tells us that he was led into that opinion in favour of lay baptism, partly by good nature, and partly by the authority of great names ; but, he says, "I have been robbed of a pleasing delusion." No man, he says himself, could have been more fully satisfied of this. Every one would wish to run along with the popular arguments of my learned friends. Excluding people from Christian burial ! We know what these topics are. When Dr. Waterland came to examine the question, error was done away, the truth prevailed, and the firm evidence of Van Mildert's "Life" is, that he lived and died in the full belief of the invalidity of lay baptism.

This case is not a case of lay baptism ; but, simply and undoubtedly, a case of schismatical baptism,—a case of a separatist from the Established Church,—a person professing not to be of the Established Church, and yet not coming under the Toleration Act,—a person in schism. My learned friends say that we contend that a person, in order to convey real baptism, must have apostolical descent. It is in vain for my learned friends to talk of the nonsense of episcopal ordination. We hold that there must be a descent from the apostles, in order to constitute a "lawful minister."

*Dr. Nicholl.*—I said it was absurd to say that, by a "lawful minister," you meant any except a lawful minister of the Church of England.

*Dr. Phillimore.*—My learned friend who has last addressed the Court, has chosen to read us a lecture on the course of proceeding we have adopted, he being the junior counsel in the case, and the only one who thinks that we have taken an erroneous course. I feel, and I am convinced, that we have acted rationally, sensibly, and as became us. My learned friend says that Dr. William Adams and Dr. Edwards acted differently in a case to which allusion has been made. But the cases are not the same. In the case referred to

the proceeding was by a Dissenter,—an acknowledged Dissenter, within the range of the Acts of Toleration. We appear here opposed to a member of the Church of England, professing himself a separatist from that church, and invoking the canon law of the country against a minister of the Church of England. I say there is a great difference in the cases. We deemed it extremely desirable that we should bring in a plea which might give to the Court a statement of the facts on which we rely, and afford to my learned friends an opportunity of answering those facts. We have produced no witnesses, but my learned friends have done so. This case is totally different from the one brought before the Court on a former occasion, and we feel desirous of taking it for the opinion of a superior Court.

The plea on the other side is confined simply to the sixty-eighth canon. Against that canon they say we have offended. I before stated to the Court the reasons which made me think that the person who promotes this suit has placed himself out of Court, and has no *persona standi* in this Court. One of those reasons is that the promoter of this cause is *ipso facto* excommunicated. Another is, that, whether excommunicated or not, it is impossible for a person so separated to invoke the authority of the ecclesiastical judge, he himself being an offender against ten or twelve of the canons of the very code under which he seeks to bring our client to punishment. It is not my intention to go into that question again. I consider that the Court has decided it ; and it would, therefore, be improper for me to raise the objection again. I hope that, with regard to the second point, the Court will seriously consider, before it determines this case, whether at Common Law, a common informer, himself guilty of an offence, would have the power of promoting the office of the judge. I think my learned friends should have proceeded without invoking the office of the judge. The Court asked me, the other day, if any of these parties, on the ground of my objection, were debarred from being witnesses. Certainly not : but it is one thing to be a witness in a case, and another to prosecute a person for a breach of the same law which you yourself have broken. I will, however, dismiss these arguments, and come to the facts, which seem to me more important.

First, then, as to the nature of this proceeding. This suit is

brought by whom ? By a class-leader of the Wesleyan body. I entertain no objection to the Wesleyan body ; I have the utmost respect for them in many respects ; and I wish my learned friends had not shaped their case as if this was a proceeding of one body of Christians against another. But I must take the Court into the evidence in the case, that the Court may see precisely how we stand, the one party with respect to the other.

My learned friends have examined several witnesses. The first is Mr. Elisha Balley. He says that, in the months of September and October, 1839, the father of this child, Thomas Cliff, was an inhabitant of the parish of Gedney ; he was a blacksmith ; and in the said months of September and October, 1839, was in the habit of frequenting the Wesleyan chapel. He says, also, that the parents of this child were, like himself, of the class of people commonly known as Wesleyan Methodists ; and that, in consequence of a communication made to him, he called at the house of Thomas and Sarah Cliff, and then and there baptized their infant child, according to the regular form of baptism received and observed among the Wesleyan Methodists. My learned friend who last addressed the Court, spoke as if there had been some urgent necessity here. None is inferred ; none is proved. I would call the attention of the Court to the circumstance that this is not the ordinary case of a layman baptizing a child in a case of necessity, in consequence of some mistaken notion that it is better to give the child a chance of salvation by baptism, than to leave him to the uncovenanted mercy of God. This is a case of deliberate baptism by a person not ordained or in holy orders. The witness proceeds —“ My state and occupation in life is that of a Wesleyan minister. “ My age is twenty-six years. I was never ordained.”

Sir HERBERT JENNER.—As to the child’s being ill at the time of baptism, the mother of the child says in her evidence “ The child was taken ill soon after its birth, and never was well afterwards.”

Dr. *Phillimore*.—If they meant to dwell upon that necessity they would have pleaded it. They set up the right of baptizing under any circumstances. I wish, however, to bring the facts of the case clearly before the Court.

Mr. Balley proceeds to say, “ I preach the Word of God by the authority of the Wesleyan Conference, but I have no authority to

“ administer the sacrament of baptism.” What must strike every one upon hearing this? Why, if a baptism performed by a person without any legal or religious authority whatever is to be good and valid, what is to prevent any person in this country from performing the rite of baptism for his children? If your farmers,—your servants,—any body, in short, in any parish or city, have a right to administer baptism to infants, and it is not held to be illegal, see to what a monstrous and dangerous absurdity it would lead. I do not know why you should refuse to your baker and your coachman that which you grant to an unauthorized minister. Then Mr. Balley says, “ The Wesleyans are generally in the habit of speaking, acting, “ and giving themselves out as persons who have not left the “ Church, and who still belong to the Church. I do not consider “ myself as having voluntarily left or seceded from the Church of “ England. I do consider myself as having always, from the time “ when I was baptized, belonged to that Church, and I never did “ leave it or secede from it.” This is one of the very persons against whom the canons of 1603 were pointed. He goes on to say, in answer to the ninth interrogatory, that he does not renounce the services of the Church, and that he has no authority to administer the sacraments. He admits this passage in Mr. Wesley’s “ Sermons,”—“ I wish all of you who are vulgarly called Methodists would seriously consider what has been said, and particularly “ you whom God hath commissioned to call sinners to repentance: “ it does by no means follow from hence that ye are commissioned “ to baptize or administer the Lord’s Supper; ye never dreamed of “ this for ten or twenty years after you began to preach; ye did “ not then, like Korah, Dathan, and Abiram, seek the priesthood “ also.”

So stands the evidence of this clerical gentleman. But we have another gentleman, Mr. Robert Bond, one of more mature age. He says, “ I am a Wesleyan Minister, I am superintendant of the “ Wisbeach Circuit, which with Wesleyans comprehends different “ towns and villages, in reference to which Wisbeach is considered “ the principal town. My then colleague, Mr. Balley, communicated to me the circumstance of his having baptized the infant “ daughter of Thomas and Sarah Cliff.” The minister who performed the baptism does not set forth any necessity. Mr. Bond continues, “ On his report I registered the baptism in question, and he

" signed the entry of it, which I made. The child's name was  
 " Elizabeth Ann Cliff. The death of the said child was reported  
 " to me as having taken place on the 14th of December, 1839, and  
 " which was about two months after the baptism. I saw its corpse  
 " on the 17th day of the said month of December, the day of its  
 " interment. It was on the evening of the 16th of the said month  
 " of December that I received intelligence of the death of the said  
 " child, as having happened as aforesaid. I was staying at that  
 " time at Gedney Drove End, in the parish of Gedney. It was  
 " Thomas Cliff, the father of the said child, who told me of its  
 " death, and in consequence of what he said to me in telling me of  
 " it I waited on the morning of the following day upon the Reverend  
 " Thomas Sweet Escott, the party against whom the Office of the  
 " Judge is promoted in this cause. He is the vicar of the parish  
 " of Gedney; and his residence being about three miles distant  
 " from the house of my fellow witness, Mr. Overton, with whom I  
 " was staying at the time, the latter offered to drive me in his gig  
 " to Mr. Escott's house, and he did so. As we were thus pro-  
 " ceeding together to Mr. Escott's house at Gedney, and when we  
 " were within about a quarter of a mile of it, we met that gentleman  
 " walking in the road: Mr. Overton told me it was Mr. Escott, for  
 " I did not know him myself by sight at the time. I addressed him,  
 " asking him if his name was ' Escott,' to which he very politely  
 " replied in the affirmative; I then said to him, ' I understand, sir,  
 " that you have refused to bury the child of Thomas Cliff (meaning  
 " the aforesaid child of Thomas and Sarah Cliff) on the ground of  
 " its having been baptized by a Wesleyan minister and not by a  
 " minister of the Established Church.' I believe that those are the  
 " very words I made use of to him. He immediately replied, ' I  
 " shall adhere to the determination I have expressed.' I believe  
 " that those are the very words he then uttered. I said to him  
 " then ' I suppose, sir, that you are aware that you are acting ille-  
 " gally.' ' That,' he replied, ' is a question.' I then referred him  
 " to a case in which a bishop of the Church of England had sus-  
 " pended a clergyman under similar circumstances—I mean for  
 " having refused to bury a child baptized by a Wesleyan or by  
 " some dissenting minister. I had read of that case in several  
 " newspapers; but though I remembered the particulars of it at  
 " that time I have forgotten them now, and have been unable to

" recall them to my mind although I have endeavoured so to do.  
 " Mr. Escott appeared to remember the case I alluded to, and to  
 " know all about it, and in reference to my allusion to it, he said,  
 " ' I question the truth of that statement,' meaning, I presume, the  
 " accuracy of the report in the newspapers of the case to which I  
 " had alluded. I then reminded Mr. Escott of the impolicy of the  
 " line of conduct which he was pursuing, telling him that he was  
 " placing himself in array against some of the best friends of the  
 " Church. He replied contemptuously, as I conceive, ' Yes, pro-  
 " fessedly.' I challenged him to adduce any case of insincerity on  
 " the part of the Wesleyans in their professions towards the Church;  
 " I adverted to the unkindness and even inhumanity of such a  
 " course at a time when the parents' feelings were so lacerated.  
 " ' That,' he said, ' is a mere opinion ; ' and one,' I replied, ' which  
 " is very generally entertained.' He then turned round abruptly,  
 " saying in a firm and decided manner, ' Well, I have told you my  
 " determination,' and began to walk away; I said then to him,  
 " from the gig where I was sitting with Mr. Overton, neither of us  
 " having alighted, ' I am very sorry to detain you, but if this is your  
 " determination, I will tell you mine, I shall feel it to be my duty  
 " to take the promptest measures in this business, and shall there-  
 " fore at once write to the bishop of the diocese on the subject ;'  
 " at the same time I intimated to him my hope that he would think  
 " better of the subject in the course of the day and alter his deter-  
 " mination; I informed him moreover that I should attend the  
 " burial of the child in the afternoon, and that if he still refused to  
 " attend and perform the burial service I should do all I could to  
 " promote a decent and spiritual improvement of the occasion." It is impossible to read this without remarking that a minister of the same persuasion with him who had baptized the child, says he would perform the funeral rites; and I say it is the natural course of things, that they who baptize in these cases should be responsible for the burial of infants who die in their own persuasion. [Dr. Phillimore having read some further parts of the evidence, proceeded.] It seems to me that it is very material that these facts should be brought to the view of the Court, to show the *animus* with which this suit is brought. If Mr. Escott considered, in consequence of the duty imposed upon him at his ordination,—from his sense of the necessity that an apostolical commission should

descend upon any clergyman to authorize him to perform the rite of baptism,—and from his construction of the sense and meaning of the burial service, that it was his duty to refuse to bury this child, it will be for the Court to decide whether or not he was justified in that refusal.

But the Court must take the converse of the point, and look at the conduct of the parties on the other side. It appears clearly from the evidence that, though belonging to the Established Church, they are separated from it. The parents voluntarily brought their child to be christened by a Wesleyan minister. It appears, further, that this Wesleyan minister is in the habit of christening all children brought to him: and that there is a burial ground belonging to this dissenting congregation near the place. Well, what happens? The body of the child is brought to the Church. The interment takes place—by whom? Who reads the prayers? A minister of their own persuasion. The bell was tolled; there was every suitable solemnity; the child was buried; and I should think it would be more pleasing to the people to have the ceremony performed by their own minister.

**Sir HERBERT JENNER.**—The ceremony that was performed was outside the church gates,—not over the grave.

**Dr. Phillimore.**—No; the ceremony was performed just without the churchyard. The corpse was carried in at the usual gate, and there interred. Now, have these dissenting persons any ground of complaint? It appears to me that it is a vexatious act on the part of these Wesleyans. The child having been buried, the prayers read over it by their own minister, the body put into the grave in the churchyard, I ask whether the clergyman has not acted justly and properly? I must say, as far as I can understand the case, everything has been decently done in respect to this child. The common law allows the child of any Dissenter to be buried in the churchyard, but leaves it to the Ordinary to determine how it shall be done. There never was a person who had so little to complain of as the person promoting the office of the judge in this case. The question is, whether the Court is so bound down by the canon as to compel the clergyman to suffer punishment—and not slight punishment, but disgrace and punishment—for the commission of an act of this description. This is a criminal suit, and the judge must try it by all the rules of criminal proceedings.

Now, before I quit this part of the subject, I must say there is no necessity shown for this baptism. It is a schismatic baptism, exactly what the canons decide to be such. Therefore, *prima facie*, I should say they can have no possible right to proceed under the canons. My learned friends have, in their arguments, confounded things which are totally distinct—lay baptism, and baptism in schism. Their arguments are all respecting lay baptism. They may, indeed, say the one involves the other. Then the question for the Court is whether it is so ; and whether we can make out that a schismatic baptism is totally different from a lay baptism ?

I cannot forbear altogether from noticing the historical part of the case ; I will do so shortly. My learned friend who commenced this discussion said there were three points for consideration in the case. First, what the primitive Church thought of baptism by unordained persons. Secondly, what the Roman Catholic Church thought of such baptisms. Thirdly, how the Church of England had treated and considered this subject. They form very distinct and separate branches. Fortunately, the easiest of discussion is that which respects the primitive Church.

My learned friend stated that the doctrine of the primitive Church was involved in great obscurity. I apprehend that the doctrine of the primitive Church on this point is so clear as to admit of no doubt ; I mean subsequently to the time of the Apostles, and before errors of any description, heretical errors, had crept in. I shall confine myself simply to that branch of the question which relates to the primitive Church ; and I think I cannot do better than take the authority of my learned friend's great champion for the validity of lay baptism—Mr. Bingham. His opinion is so very short that I cannot state it more concisely, and I shall therefore read to the Court what he says in the "Scholastic History," Part I. chapter i. section 2 : "To begin with the practice of the ancient "Church. It is certain, the commission to baptize was originally "given by our Saviour to the eleven Apostles ; for so it is ex- "pressly said, Matt. xxviii. 16—20 ; and by the tenor of this com- "mission, it is certain they were invested with authority not only to "baptize themselves, but to communicate this power to others ; for "the commission and power of baptizing was not to die with them, "but to continue to the end of the world."

Now Dr. Waterland, whose writings have been cited, says, "The

" ancients do with one voice, for nearly three hundred years, con-  
 " demn lay baptism; not so much as even putting in an exception  
 " to cases of necessity. Tertullian speaks in favour of it, but on  
 " private opinion, and founded on very bad reasons." Bingham in  
 the third section, goes on to show that the bishops become invested  
 with the same power which the Apostles exercised. In the seventh  
 section, he says. " Now here it is certain that laymen were always  
 " debarred from meddling with the administration of baptism, in all  
 " ordinary cases. All the former allegations, which make it the  
 " proper office of bishops and presbyters, even to the exclusion of  
 " deacons, are certainly of much greater force against the usurpations  
 " of laymen. Besides, they are sometimes prohibited in particular by  
 " name: as in the Apostolical Constitutions three times at least. ' We  
 " do not permit the laymen to perform any sacerdotal office, as the  
 " sacrifice of the eucharist, or baptism, or imposition of hands, or  
 " the lesser or greater benediction; for No man taketh this honour  
 " to himself but he that is called of God.' This dignity is given  
 " only by the laying on of the bishop's hands; but he that takes it  
 " to himself without commission, shall sustain the punishment of  
 " Uzzias. The author, under the name of St. Ambrose, says  
 " therefore, ' That from the time of the Apostles, the inferior clergy  
 " and laymen were prohibited to baptize.' Which at least must be  
 " understood of a prohibition to usurp the office, and to do it in or-  
 " ordinary cases." And Dr. Waterland, in arguing the point, says he  
 cannot see why laymen should be authorized to baptize, or ad-  
 minister other offices, specially vested in the sacerdotal office. I take  
 these authorities to be quite conclusive as to the doctrine of the  
 primitive Church for the first three hundred years, that laymen  
 were entirely and strictly forbidden to baptize.

Now, so the matter rested till innovations crept into the Church of Rome. It is unnecessary here to trouble the Court with any citations from the canon law. My learned friend on my right cited the rituals of the Roman Catholic Church. I allow that the Roman Catholic Church admitted lay baptism. It would lead to endless discussion were I not to admit it. It was an error, the correction of which, we say, the Reformed Church set about. It is clear that this practice was a corruption of the Church of Rome; it grew up from the desire of emolument, which was the foundation of many of the errors of that Church. The Roman Catholic Church will help us in nothing.

The Court is perfectly well aware of the proceedings generally which took place with respect to the Reformation. After the death of Henry the Eighth, and during the reigns of his three children, the greatest difficulty consequent on the Reformation was with respect to the Sacraments. There were two Sacraments observed by the Reformed Church—Baptism and the Supper of the Lord. It is clear that Queen Elizabeth felt great difficulty as to the doctrine of the Real Presence in the Sacrament. Now baptism also formed another great point of difference. In the Roman Catholic Church it had been the habit to allow laymen to baptize, but in cases of necessity—not schismatically. The Court will find no instance of a person in schism from the Church of the country being allowed to baptize.

All my learned friends seem to have formed a most extraordinary opinion about the Convocation of 1575. They one and all attacked us for the way in which we have introduced the mention of it in our allegation. They also stated that one of the Articles agreed to by that Convocation did not form a part of those Articles; that it was illegal, and that the bishops had not the power to make such a law. They seem to me to mistake the view of the case. They say to us “ You are *felo de se*. The Act of Uniformity of 1596, which you “ have cited, destroys your theory.” My learned friends laid great emphasis on the ritual of Edward the Sixth, especially this part of it: “ *Let them that be present* call upon God for his grace, and say “ the Lord’s Prayer, if the time will suffer; and then *one of them* “ shall name the child, and dip him in water, or pour water upon “ him, saying these words, ‘ I baptize thee in the Name of the “ Father, and of the Son, and of the Holy Ghost;’ and let them not “ doubt that the child so baptized is lawfully and sufficiently bap- “ tized, and ought not to be baptized again. But nevertheless, if “ the child, &c.” What is the meaning of this? Undoubtedly it gives an opening to laymen and midwives to baptize, because it is not in any way limited. But, then, there is nothing decisive against a baptism by a lawful minister; and we can understand why, when there was a great anxiety to maintain the ancient practice, Queen Elizabeth, with her peculiar notions on this subject, might not like to set the country in a flame by making any positive enactment.

The Convocation to which so much reference has been made, took place in the year 1575. The Article as to baptism stands in the body of the Articles. It is inserted by Collier in his Ecclesiast-

tical History. The Article states that, "Whereas some ambiguity  
 " and doubt hath arisen among divers, by what persons private  
 " baptism is to be administered." This was a natural doubt, growing  
 out of the transition from Papal errors to the pure doctrine of  
 the Reformed Church. The Article then proceeds, "Forasmuch as  
 " by the Book of Common Prayer allowed by the statute, the  
 " bishop of the diocese is authorized to expound and resolve all  
 " such doubts as shall arise concerning the manner how to under-  
 " stand and to execute the things contained in the said book ; it is  
 " now by the said archbishop and bishops expounded and resolved,  
 " and every of them doth expound and resolve, that the said private  
 " baptism, in case of necessity, is only to be ministered by a lawful  
 " minister or deacon, called to be present for that purpose, and by  
 " none other : and that every bishop in his diocese shall take order  
 " that this exposition of the said doubt shall be published in writing,  
 " before the 1st day of May next coming, in every parish church of  
 " this diocese in this province, and thereby all other persons shall  
 " be inhibited to intermeddle with the ministering of baptism pri-  
 " vately, being no part of their vocation." Nothing could be more  
 natural than that, in the fluctuating state of men's minds at this time,  
 such an ordinance should be published. My learned friends say it  
 is not lawful ; but it received the sanction of the royal authority—  
 of the Queen, as the head of the Church, and with her authority it  
 was legal. Collier tells us, in his Ecclesiastical History, that "This  
 " Article, being very remarkable, I have given it in the very words  
 " of the record." He goes on to say, "The Queen refused to  
 " assent to the last Article, (that on marriage), for which reason it  
 " was not published with the rest." What is the fair legal inference ? That this Article, to which I have referred, was—as it was  
 intended to be—sent round to the bishops of each diocese to be  
 published. It was found by Collier entered in the Journal of this  
 Convocation, at folio 140, *et deinceps*. Collier proceeds to say that,  
 in the archbishop's mandate for the publication of these Articles,  
 they were said to be settled and agreed upon by both Houses of  
 Convocation. This was in 1575.

Gibson has this observation :\* "This Article was not published  
 " in the printed copy, but whether on the same account as the  
 " fifteenth Article I cannot tell. However, the ambiguity remained  
 " till the Conference at Hampton Court, in which the king said, that

\* Codex, 2d edit. i. 36.

“ if baptism was termed private, because any but a lawful minister  
 “ might baptize, he utterly disliked it, and the point was there de-  
 “ bated ; which debate ended in an order to the bishops to explain  
 “ it so as to restrain it to a lawful minister. Accordingly, in the  
 “ Book of Common Prayer, which was set forth the same year, the  
 “ alterations were printed in the rubrics as I have noted them be-  
 “ fore ; and other expressions in other parts of the service, which  
 “ seemed before to admit of lay baptism, were so turned as expressly  
 “ to exclude it.”

The two writers to whom I have alluded have recorded this Article; and though they mention that the queen refused her assent to one Article—the fifteenth—it does not appear that she refused to confirm this.

But we have other evidence on this point,—that of Wheatley. His work was a text-book at Oxford in my time, and I suppose it so continues to this day. “ Afterwards, when men came to have “ clearer notions of the Sacrament, and to perceive how absurd it “ was to confine the mercies of God to outward means ; and espe- “ cially to consider that the salvation of the child might be as safe “ in God’s mercy without any baptism, as with one performed by “ persons not duly commissioned to administer it : when the go- “ vernors of our Church, I say, came to be convinced of this, they “ thought it proper to explain the rubric above mentioned in such “ manner as should exclude any private person from administering “ of baptism. Accordingly, when some articles were passed by “ both Houses of Convocation in 1575, the archbishop and bishops “ (who had power and authority in their several dioceses to resolve “ all doubts concerning the manner how to understand, do and “ execute the things contained in the Book of Common Prayer) “ unanimously resolved, that even private baptism, in case of neces- “ sity, was only to be ministered by a lawful minister or deacon, “ and that all other persons should be inhibited to intermeddle with “ the ministering of baptism privately, as being no part of their “ vocation. . . . . So that from this time, notwithstanding the “ rubric might continue in the same words, it is certain that it gave “ no license or permission to lay persons to baptize. On the con- “ trary, the bishops in their visitations censured the practice, and “ declared that the rubric inferred no such latitude.”\* It seems to

\* Ch. VII. Appendix I. s. 2.

me to be confirmed by the history of these times, that there was a doubt as to the making of any alteration in the rubric ; but the bishops determined so to give their advice as to exclude lay baptism. I have gone into this part of the question at much length, on account of the immense importance which seemed to be attached to it on the other side. There can be no doubt of the existence of this Article, or as to the manner in which it has been enforced. It is, however, of little importance, for the question is, what was done in 1603 ?

My learned friends have contended that, after the alterations in 1603, lay baptism was the practice of the Church of England. I have already cited the opinion of Bishop Gibson, who says that in 1603 it was expressly excluded. I must now hasten to the commencement of the reign of James the First, when the alteration was made, which, I conclude, continues to the present day. It was natural that people's minds should be prepared for some alteration on this point. The errors of the Roman Catholic Church were daily more and more exposed to the public view. At the accession of James the First there was a number of persons called Puritans, who were the only dissenters in England. They had had disputes after disputes on different points. Queen Elizabeth issued the strongest edicts against them. She burnt some, and hanged others, but still they went on. James, on coming to the throne, was met by a petition called the "Millenary Petition;" so called, because intended to be subscribed by a thousand persons, complaining of grievances of the Church ; and he heard these petitioners at a Conference at Hampton Court, where they were engaged on one side, and the bishops on the other. The king opened the Conference himself, and stated his objections to confirmation, absolution, and baptism. The words of the historian are : "His majesty's third " objection was private baptism ; and here he made a distinction. " If it was private with reference to the place, he thought it con- " sistent with the practice of the primitive Church. If it related to " the person, he disliked it to the last degree."\* That is, if it was performed by a layman, he disliked it.

My learned friend who last spoke has cited the authority of Archbishop Whitgift. It seems that on this occasion the archbishop "endeavoured to satisfy his majesty that the administration of

\* See Cardwell's Conferences, 175—202.

“ baptism by women and laics was not allowed by the Church of “ England. Because (he says) the bishops in their visitation cen- “ sured this practice, and the words in the office do not infer any “ such permission.

“ To this the king excepted, cited the office, and argued that the “ words could not be construed for less than a permission to women “ and lay persons to baptize.

“ The Bishop of Worcester confessed that the words were ambi- “ guous ; but, by the counter-practice of the Church, it seems “ reasonable to suppose that the compilers of the office did not “ intend it to be so considered.”

So stood the controversy ; and I think the reference I have made is of itself sufficient to satisfy the Court that the twelfth Article of 1575 was, at this time, fresh in men's minds, and also in practice. The result was a proclamation, declaring that it was not expedient to make any material alteration in the service, and enjoining all men to be conformed to the Book of Common Prayer, as being the only public form of serving God established in this realm. His majesty also admonishes all his subjects, of whatever rank, not to expect any alteration in these public services.

My learned friend asserted that there was no material alteration in the canons. I think there is a most extraordinary alteration, for I find a new canon introduced—the sixty-ninth—“ Ministers not “ to defer christening, if the child be in danger,”—which seems to grow out of the discussions at Hampton Court. It declares that—

“ If any minister, being duly, without any manner of collusion, “ informed of the weakness and danger of death of any “ infant unbaptized in his parish, and thereupon desired “ to go or come to the place where the said infant re- “ maineth, to baptize the same, shall either wilfully refuse “ so to do, or of purpose, or of gross negligence, shall so “ defer the time, as, when he might conveniently have “ resorted to the place, and have baptized the said infant, “ it dieth, through such his default, unbaptized ; the said “ minister shall be suspended for three months.”

Does not this follow out the determination that none but the “ lawful minister” should perform the rite of baptism ? In King Edward and Queen Elizabeth's Prayer Book the words “ lawful minister” never occur from beginning to end. The rubric is, “ Of

them that are baptized in time of necessity." In all these cases it is necessity alone which authorizes the interference of a layman. The rubric of 1603, however, is thus:—" When need shall compel " them so to do, then baptism shall be administered on this fashion : " First, let the lawful minister, and them that be present, call upon " God for his grace, and say the Lord's Prayer, if the time will " suffer. And then, the child being named by some one that is " present, the said lawful minister shall dip it in water or pour " water upon it." Here is a studious introduction of the words " lawful minister." They go through the whole service ; and whatever was before left ambiguous, is here confided to the lawful minister. When the Court reflects upon the citation of the Conferences at Hampton Court, combining it with these alterations in the rubric of 1603, can there be a doubt—King James's opinion being known—that that rubric was intended to exclude any individual, except a lawful minister, from administering the sacrament of baptism in the English Church ?

I have already cited to the Court the opinion of Bishop Gibson on this subject. I will now come to the great champion of my learned friend—Mr. Bingham. In his " Scholastic History," published in 1726 (Part i. Chap. iii. sect. 5) he says, the alterations in the rubric of James I. were such as to forbid any but a lawful minister to baptize. " This," says he, " determined the question " about the lawfulness of lay baptism so far, as that now it could " not well be thought to be permitted or enjoined by the Church."

The Court will also find in Wheatley : " In the Common Prayers " of King Edward and Queen Elizabeth there were two questions " asked, which are now omitted, viz., ' Whether they called upon " God for grace and succour in that necessity ? ' and ' Whether " they thought the child to be lawfully and perfectly baptized ? ' " Which latter question was also continued quite down to the Re- " storation. The words, ' and because some things essential,' &c. " were first added to King James's book, at which time the altera- " tion was made to prevent lay baptism even in cases of extremity. " And therefore these words cannot be urged to prove that the " Church does not hold that the commission of the administrator, " as well as the matter and form, is of the essence of baptism."\*

\* Wheatley, *ubi supra*, sect. 4.

These things will sufficiently satisfy the Court, that by the Book of Common Prayer of James I., lay baptism was utterly repudiated by the Church.

My learned friends have gone extensively, in their addresses, into the disputes and discussions which took place from the time of the adoption of this rubric to the present day; but it does not appear to me that they very materially bear upon the subject. I feel myself, very forcibly, with Dr. Waterland, that many things which out of good nature and kindness we would wish to be as they are represented, we find on investigation to be pleasing errors. I cannot help coming to the conclusion that these baptisms by laymen are not baptisms—that there is not a clear account of the transmission of authority to them from the persons who represent the Apostles. And, in the case we are now considering, where a person baptizes who is not authorized by his own Church, and to whom authority to baptize is forbidden by the founder of his sect, I cannot, apart from the consideration of schism, regard such a baptism as one which can be recognized by Christ's Church.

The disputes about lay baptism went on, but I do not find anything respecting schismatical baptism. My learned friends cited Bingham, Fleetwood, Hooker, and other great names, as favourable to lay baptism. If they have great names in their favour, we have in ours Archbishops Usher and Bramhall, Mr. Lawrence and Bishop Jeremy Taylor. Jeremy Taylor, speaking of lay baptism, says, "The custom came in at a wrong door; it leaned upon a "false superstitious opinion; and they thought it better to invade "the priest's office, than to trust God with the souls he had made "with his own hands, and redeemed by his Son's blood." Bishops Beveridge and Wilson, Mr. Wheatley and Mr. Leslie, are in our favour; but they only consider the question which was then raised, whether persons baptized by laymen should be deemed validly baptized. I have looked with considerable anxiety through these authors, and can find nothing which goes to the point more immediately before the Court,—whether the baptism of a person in avowed schism has been held good by the Church, or by the ecclesiastical courts of that body whose privileges are invaded. Why should they not administer the Lord's Supper, as well as the sacrament of Baptism? They do not, in this case, plead necessity for this baptism. In the decency of former times necessity was pleaded.

Sir HERBERT JENNER.—What do you mean by former times?

Dr. *Phillimore*.—I mean in the time of the Roman Catholics. My learned friend's argument is that anybody may baptize.

Then as to the Convocation of 1712. What comes of that? One House of Convocation thinks one way,—the other, another; and all on the theoretical point as to whether these persons should be rebaptized or not. The Convocation was roughly dissolved; one House thinking one way, and the other, another; and nothing was done.

Another polemical discussion took place, Mr. Kelsall being on one side, and Dr. Waterland on the other. Dr. Waterland, however, had changed his opinions.

Then as to Bishop Mant. My learned friend said that all the bishops were agreed in supporting the view taken by Sir John Nicholl. I said I had in my hand the authority of a bishop who thought differently. Mant's Bible and Prayer Book were published under the authority of the late Archbishop of Canterbury, but he was not answerable for all the opinions contained in every note of this work.

I should advance nothing if I kept the Court for the next three hours in going into what has been said on the one side and the other. Bishop Burnet has been quoted, but though he was a low churchman, what he says is in our favour. Writing on the 23d article, he says, “ We have reason to believe that none ought to “ baptize but persons lawfully ordained. Yet since there has been “ a practice so universally spread over the Christian Church, of “ allowing the baptism not only of laics, but of women, to be lawful, “ though we think it directly contrary to the rules given by the “ Apostles, yet since it has been so generally received and prac-“ tised, we do not annul such baptisms, or rebaptize the persons so “ baptized.” In these dark ages people had a notion that if a child was admitted into the Church by baptism, that child's salvation was secure. “ We know the origin of this bad practice was from “ the opinion of the necessity of baptism to salvation,” Burnet proceeds. Thus Bishop Burnet thinks it was directly contrary to the rules of the Apostles for laymen to baptize. I really wonder that my learned friend should have cited his opinion. I have never seen anything which, in my judgment, was more condemnatory of the practice of lay baptism.

I now come to what I consider the most important part of this case—the question of burial. A clergyman, when he is ordained, binds himself to certain conditions in a very solemn manner. The preface to the Ordination Service runs thus:—" It is evident unto " all men, diligently reading the Holy Scripture and ancient au- " thors, that from the Apostles' time there have been these orders " of ministers in Christ's Church; bishops, priests, and deacons. " Which offices were evermore had in such reverend estimation, " that no man might presume to execute any of them, except he " were first called, tried, examined, and known to have such qual- " ties as are requisite for the same." There is no solemnity more imposing than the Ordination Service. The clergyman of the Church of England is admonished that, " To the intent that these " orders may be continued, and reverently used and esteemed, in " the United Church of England and Ireland; no man shall be " accounted or taken to be a lawful bishop, priest, or deacon, in the " United Church of England and Ireland, or suffered to execute " any of the said functions, except he be called, tried, examined, " and admitted thereunto, according to the form hereafter following, " or hath had formerly episcopal consecration or ordination." He is instructed that no one can perform the sacraments of religion, except persons properly ordained. He is admonished to " be " ready, with all faithful diligence, to banish and drive away all " erroneous and strange doctrines, contrary to God's word; and to " use both public and private monitions and exhortations, as well " to the sick as to the whole, within your cures, as need shall re- " quire, and occasion shall be given." He is then sworn to obey the Articles of religion, and the twenty-third of those Articles we find to this effect:

" It is not lawful for any man to take upon him the office of " public preaching, or ministering the sacraments in the " congregation, before he be lawfully called and sent to " execute the same. And those we ought to judge law- " fully called and sent, which be chosen and called to this " work by men who have public authority given unto " them in the congregation, to call and send ministers " into the Lord's vineyard."

Therefore, a clergyman positively takes a vow, under the most solemn obligation, to consider no one as a minister, or capable of

ministering the sacraments of his Church, but those who are “ law-“ fully called and sent to execute the same.” You cannot, then, be surprised that a person in this situation should be concerned to find an individual having no ordination, performing one of the most sacred religious rites upon a child in his own parish.

Then we come to the Burial Service,—a most awful service; and every one must be struck with the almost impossibility of reading it over a person hostile to the communion of the Established Church. The expressions occur again and again, “ our brother,” “ our dear “ brother here departed;” and the whole frame and tenor of the service is such, that it must be performed over a person of the same communion with the party performing it,—whether a Presbyterian, an Unitarian, or whatever he may be. Then, what is the preface to that service? It is this:—“ Here is to be noted, that the office “ ensuing is not to be used for any that die unbaptized, or excom-“ municate, or have laid violent hands upon themselves.” I rest entirely upon the word “ unbaptized;” and I say that, in sense, any person not in communion with the Church of England is unbaptized. Any person baptized by an itinerant preacher, cannot be considered as a baptized person in the sense of this rubric:—such a person has received a schismatical baptism, which upon the face of it is a nullity. The question is, in what sense is the law to take these words? When were they introduced? At the era of the Reformation. I do not like to grapple with the authority of the learned judge who decided the former case, but on this point I think his argument is capable of an easy solution. He says,\* “ The plain simple import “ of the word unbaptized, in its general sense, and unconnected with “ the rubric, is obviously a person not baptized at all, not initiated “ into the Christian Church.” Now I think you cannot here take this word “ unbaptized” except in connexion with the rubric; it forms part of the rubric. The learned judge proceeds—“ In com-“ mon parlance, as it is sometimes expressed, that is, in the ordinary “ mode of speech, and in the common use of language, it may be “ said that this person A. was baptized according to the form of the “ Romish Church, that another person B. was baptized according to “ the form of the Greek Church, that another person C. was baptized “ according to the form of the Presbyterian Church, that another “ person was baptized according to the form used among the Calvin-

\* *Kemp v. Wickes*, 3 Phillimore, 270.

“ istic Independents, and that another person was baptized according “ to the form used by the Church of England ; but it could not be “ said of any of those persons that they were unbaptized ; each had “ been admitted into the Christian Church in a particular form.’ But the Liturgy here is not for those admitted into the *Christian Church*, but those admitted into the *Established Church*. The learned judge continues :—“ But the ceremony of baptism would not have “ remained unadministered, provided the essence of baptism, accord-“ ing to what has generally been received among Christians as the “ essence of baptism, had taken place. Such being the general “ meaning of the word, in its ordinary application and use, and “ standing unconnected with this particular law, is there anything “ in the law itself, in its context, that varies or limits its meaning ? “ The context is, that the office shall not be used for persons who “ die unbaptized, or excommunicate, or that lay violent hands “ upon themselves. What, then, is the description of persons ex-“ cluded from burial that is put in association with these unbaptized “ persons ? Excommunicated persons and suicides.” I think in this exposition of the meaning of the word “ unbaptized,” there is an attempt to keep it separate from that of which it forms an integral and essential part. You cannot take the word in the abstract ; you cannot take it by itself.

What says Wheatley on this point. “ Whether this office is to be “ used over such as have been baptized by the Dissenters or Secta-“ ries, who have no regular commission for the administering of the “ sacraments, has been a subject of dispute ; people generally de-“ termining on the one side or the other, according to their different “ sentiments of the validity or invalidity of such disputed baptisms. “ But I think that for determining the question before us, there is “ no occasion to enter into the merits of that cause ; for whether the “ baptisms among the Dissenters be valid or not, I do not appre-“ hend that it lies upon us to take notice of any baptisms except “ they are to be proved by the registers of the church.” I think you should not be too scrupulous ; but if it is notorious that a child has been baptized by a Dissenter, you should then refuse the office. He goes on—“ The best way to put an end to this controversy is “ to desire those who have separate places of worship, to have sepa-“ rate places for burial too ; or at least to be content to put their “ dead into the ground without requiring the prayers of a minister,

“ whose assistance in everything but this and marriage they neglect “ and despise.”\* Now is not this fair? No one oppresses these persons for differing from us; but would it not be more agreeable to them—rather than insult ministers, as I say they do, by requesting them to bury persons who are not of their own communion—would it not be better for them to have their own places of burial?

Sir HERBERT JENNER.—They had not, in this particular case.

Dr. *Phillimore*.—I say again—and I cannot repeat it too often—that in this particular case they had the assistance of their minister. He was close to the churchyard, and performed their burial service. In Dean Comber’s “ Companion to the Temple,” he says, “ The “ persons capable of Christian burial are only those who die within “ the pale of the Church, for the Church excludes all others.” The old canon law was, that none should be admitted to be buried but those who were within the pale of the Church.

This brings me to the consideration of the canon under which the parties are here proceeding—the sixty-eighth canon. In order to understand this canon, it seems to me that the Court must have some reference to the history of the canon, and see under what circumstances it formed a part of the code. It is a canon of very ancient origin. It is derived, I apprehend, from an old canon, which had for its object the preventing of priests from taking excessive fees in cases of burials. The practice had grown up in the Roman Catholic Church, of priests demanding exorbitant fees for burials and christenings. We find in Gibson, pages 357 and 358, a canon for repressing this practice, the title of which is, “ *Jus sepulturæ et “ Sacra menta Ecclesiastica, nulli denegentur, ob defectum Pecuniae, “ nec pro Chrismate quicquam petendum; petens autem Anathema sit.*” The canon, which is of the date of 1222, runs thus—“ Firmiter “ inhibemus, ne cuiquam pro aliquâ pecuniâ denegetur sepultura, “ vel baptismus, vel aliquod sacramentum ecclesiasticum, vel etiam “ matrimonium contrahendum impediatur. Quoniam si quid piâ “ devotione fidelium consuetum fuerit erogari, super hoc postmodum “ volumus per Ordinarium loci ecclesiis justitiam fieri, sicut in “ Generali Concilio expressius est statutum.” This canon is also given in Lyndwood, page 178. The sixty-eighth canon is, it is clear, a transcript from these canons.

\* Wheatley, ch. xii. sec. 1.

Sir HERBERT JENNER.—The word “pecuniam” is left out. There is no mention of money in our canon.

Dr. *Phillimore*.—The words are the same in other respects. There is a case, *The King v. Taylor*, bearing upon this question, of which we find some obscure traces; it is referred to in several law books, but we have in vain endeavoured to get a report of it. It took place in 1720, or 1721. We have, however, an extract from the Register Book of Daventry Church, which is thus:—

“ A. D. 1720—21 February 23 :—Sarah Carter, an Anabaptist, was brought to be buried 7th March last, and carried back again, her relations being instigated by one John Foster, (a factious Antinomian teacher living in the town,) to move the King’s Bench against me, for refusing to bury her. He obtained a rule of Court against me in Hilary Term, but it was discharged in Easter Term, without costs, it being proved that they had leave to bury her in the churchyard, though the service was denied, and not performed at last. The first motion they made was in Trinity Term, which the Court rejected, but afterwards in Hilary Term, some Dissenters falsely swearing that they were mobbed, and went in danger of their lives, the Court granted a rule *“ nisi causa.*—N. B. The gates of the churchyard were locked when they brought the corpse to be buried, but ought to have been open; that was my mistake.

“ Wm. TAYLOR.”

There is also the case of *Andrews v. Cawthorne*, Willes’s Reports, p. 536. A marginal note states that no burial fee is due at Common Law, but it may be due by custom. Mr. Justice Abney, in giving the judgment of the Court, says, “ I will give a short abstract or historical account of burial by the ancient law, civil and canon,” and afterwards adds, “ When Popery grew to its height . . . . canons were made, that bishops, abbots, priests and faithful laymen were permitted the honour of burial in the church itself, and all other parishioners in the churchyard, on a pretence that their relations and friends on the frequent view of their sepulchres would be moved to pray for the good of the departed souls. And as the parish priest by the canon was the sole judge of the merits of the dead, and the fitness of burial in the church,

“ and he could only determine who was a faithful layman, they  
 “ only were judged faithful whose executors came up to the price  
 “ of the priest, and they only were allowed burial in the church,  
 “ and the poorer sort were buried in the churchyard. This affair  
 “ of burial soon growing very profitable, a new canon was made,  
 “ that no person was to be buried out of his parish without the  
 “ consent of or till the oblation was paid to the parochial minister.  
 “ But it is worth while to observe, that none of these canons are  
 “ in force here at this day ; and I think the only canon now ad-  
 “ mitted and received by our laws relating to this question is the  
 “ canon sixty-eight of the canons of 1603, and this seems a kind of  
 “ transcript of the old laws.

“ And the burial of the dead is (as I apprehend) the clear duty  
 “ of every parochial priest and minister ; and if he neglect or re-  
 “ fuse to perform the office, he may by the express words of the  
 “ canon sixty-eight be suspended by the ordinary for three months.  
 “ And if any temporal inconvenience arise as a nuisance from the  
 “ neglect of interment of the dead corpse, he is punishable also by  
 “ the temporal courts by indictment or information. H., 7 Geo. I.,  
 “ B. R. That Court made a rule on Mr. Taylor, Rector of Da-  
 “ ventry, in Northamptonshire, to show cause why an information  
 “ should not be filed, because he neglected to bury a poor parish-  
 “ ioner who died in that parish.”

Now these two cases are extremely important. They show this—that, though the Common Law Courts have no right to interfere with the decisions of this Court, yet that in particular cases they will order a body to be buried in the churchyard, but they will not direct the performance of the service. It would be well to obtain a more correct report of the King v. Taylor. These cases seem to me to furnish extraordinary instances of this fact, that though the body must be buried, the form of burial must be left to the decision of the minister of the Established Church, under the revision, of course, of the ordinary. The law does not say, “ You shall bury in this formal manner ;” it merely says, “ This person, being a parishioner, must be buried in your churchyard.”

I have a reference here to Bishop Kennet, who has been cited by my learned friends as a strong authority on the subject. He alludes to this very case of the King against Taylor, and observes, “ The Common Law, you know, has lately determined that every

“ parishioner has a right of sepulture in the churchyard, without regard to his being in or out of the communion of the Church ; but the right is only to a grave, and to the body being put into it and covered with the earth, without any right to our Burial Service.”\* It has been argued, that the Church knows of no such indecency as the putting into the earth of a body, without the performance of the service ; but the legislature has enacted that a certain class of people shall be buried in the parish churchyard without any service being read over them. In the register of the parish of Daventry, instances are constantly occurring of entries of

\* On a subsequent day Dr. Phillimore stated that this quotation was made from a MS. letter of Bishop Kennet in the British Museum, which he had examined personally, and of which he gave the following account, and further extracts. John Stileman, incumbent of East Farndon, near Market Harborough, wrote to the bishop to ask how he should act with respect to the burial of some old Quakers in his parish, who had been baptized in their youth. The answer of Bishop Kennet is :—

“ If they were so hardened as to say in effect they were baptized in their infancy, when they could not help it, and expect no benefit by it, I should tell them that such a renouncing of their Christian baptism is much worse than if they had never received it ; and unless I could bring them to a sense of renewing their baptismal covenant, I must look upon them as apostates, that is, greater sinners than unbaptized heathens ; and I would not read the office of Christian burial for them. If I could have no satisfaction from their own mouths while living, nor from their nearest friends when dead, I mean of any death-bed declaration, I should be very unwilling to bury such an one by the form of our Liturgy ; and if in charity I did prevail with myself to do it, I should think it excusable to omit such expressions as were certainly intended for those who were admitted by baptism into the Church, and die in the communion of it. The Common Law, you know, has lately determined that the body of any parishioner has a right of sepulture in the churchyard, without regard to his being in or out of the communion of the Church ; but that right is only to a grave, and to the body being put into it, and covered with earth, without any right to our burial office. These are my thoughts, and this would be my practice ; but how far this will reach to the case of your deluded people, you yourself must judge, according to your own conscience and according to your own discretion. I dare say I shall have no reason to disapprove of what you seriously resolve and sincerely act in this matter.

“ I commend you to God in my prayers, &c.

“ Sep. 23, 1727.

WHITE PETERBOROUGH.”

persons being refused burial who were members of Dissenting congregations.

Sir HERBERT JENNER.—Lately?

Dr. *Phillimore*.—Since the case of *Kemp v. Wickes*, I believe. If the Common Law gives a right to a grave, it does not give a right to the service. If a person chooses voluntarily to withdraw himself from communion with the Church, he must take the consequences of such conduct.

Another point raised by my learned friend was that respecting the Roman Catholics. My learned friend says that the Roman Catholics, in the reign of James the First, were compelled to be buried in the churchyards of the Established Church; and this at first seems a plausible argument. It is true they were obliged at that time to be buried in the churchyards. Why? It was at the very time that James the First enforced the severest penal laws against the Roman Catholics. A Roman Catholic was forbidden all communication with any one; and the law required that Popish recusants should be buried in the church. The laws were so severe, that they were excluded from burial, except in the parish church. A clause of the act to which I refer directs that every Roman Catholic who shall have a child born, shall within a month have him christened in the parish church by a lawful minister. This destroys the argument of my learned friend as to their burial;—they were compelled not only to bury, but to christen, in the church.

Then, again, something was said as to the words “lawful minister,” on the question whether a Roman Catholic is a “lawful minister.” He is not in the sense of the baptismal service, because that designates the parochial minister, and the curate, as the lawful ministers. But if you ask, in another sense, if a Roman Catholic priest is a lawful minister, there can be no doubt on the subject.

Dr. *Nicholl*.—I say he is not a “lawful minister” within the meaning of the rubric.

Dr. *Phillimore*.—He is so far a lawful minister, that if he christens a child which is afterwards brought to the church, it is not to be rebaptized. He is not a lawful minister according to the Church; but he is so far a lawful minister that he holds his ministration by direct descent from the Apostles, and no child christened by him needs to be rebaptized.

The next question is, *quo intuitu* was this sixty-eighth canon of 1603 passed? It is a translation of an older canon. I ask if it is possible that, at the period when this canon was enacted, it could be meant to apply to any one but members of the Established Church. Non-conformity was not then tolerated. All the statutes of Queen Elizabeth and James the First made a conformity with the Established Church absolutely essential. A man could go to no other church. In Gibson's Codex, vol. ii. p. 1481, you will find a dispensation given to bury the body of a person who had been pronounced excommunicated for not attending her parish church. This was on the 16th October, 1594. I may refer, again, to the state in which the country then stood with respect to the Puritans. In 1572, there came an intimation that there was an attempt to establish a presbytery at Wandsworth. "Complaints being brought to "Court," says Gibson, "the queen issued her proclamation that the "laws for keeping up the uniformity of public worship should be "put in execution." Her majesty put it down immediately. The queen afterwards actively interfered in the year 1577; she then issued letters to her bishops prohibiting certain persons who were not duly called from preaching. In 1574, two persons for merely being Anabaptists, were executed in Holborn; and in 1588 a man was burnt, for a similar offence, at the same place. These circumstances prove that neither Queen Elizabeth nor James tolerated these schisms. If you refer to history you will find this was the very time when the statutes against Non-conformists were in the greatest vigour, and pushed to the greatest extent. Did, then, the framers of this canon of 1603 intend that the child of a schismatic should be buried within the Established Church. Such a thing was never intended. It meant only that no parishioner should be refused burial for a child; but it did not mean that a person put out of the pale of the Church,—who professed a religion different from the religion of the State,—should be allowed to have burial according to the forms of the Established Church. Can it, then,—taking this canon *pari materia* with the first twelve Articles of the Code, which are so strong against Non-conformity,—can it be supposed that it was contemplated that a person standing in the situation of Mr. Mastin should prosecute such a suit as this? Has the change of times made any difference? In one respect, a great difference. Dissenters are now tolerated, and allowed a free exercise of their

religion. Nay, the legislature has gone further, and has given them the power of having their own chapels, their own burial grounds, and so forth. Why, then, did they not inter this child in their own burial ground? Why do they bring a penal action against a clergyman because he quietly tolerated their interring the child in the churchyard? He gave them all that the common law requires;—he gave them liberty of interment in the churchyard, by their own friends, and according to the forms of their own religion. Is there anything intolerant in this? What possible reason have they to complain? I wish them all possible toleration, but the clergyman is not to violate his ordination oath; if he strictly complies with it, he believes that no sacrament can be conferred except by an authorized minister,—that the sacrament of baptism can be conferred by no other person. How, then, can you expect that he would inter this child? The question is whether the law is so severe and obdurate that it binds the Court to compel him to do so. I know many most respectable ministers of the Church of England,—respectable both as to their attainments and their station,—who entertain a strong conviction on this subject, and whom nothing but the arm of the law will induce to bury a child who has not received the rite of baptism by a minister of the Established Church.

It has been said that there is an analogy between the case of baptism and that of marriage,—that *quod fieri non debet, factum valet*. This subject is so ably treated of in a book my learned friend has cited, by Dr. Waterland, that, if my learned friend has read that book, I wonder he should advance the position. Why, according to my learned friend's argument, if a man marries his own sister, or if he marries while he has another wife living, *quod fieri non debet, factum valet*. It is absurd! Marriage is no sacrament; baptism is a sacrament. I cannot understand the analogy. I would beg to refer the Court to the first and third chapters of Dr. Waterland on this subject. He has the merit of being the last polemical writer who has written on this subject, and who has maintained manfully the invalidity of lay and schismatical baptism. I cannot part with this subject without again asking the Court to give to it its solemn consideration.

Sir HERBERT JENNER.—For that reason the Court is anxious to hear the subject fully discussed.

Dr. PHILLIMORE.—I think the investigation of the case will lead

the Court to our opinion. I think the Court never can hold, that when these canons were passed, this clergyman would have been subject to the penalties imposed by them. Let us consider, then, whether they can be enforced against him. He has refused to bury whom? A person to whom the ordinances of his Church compel him to refuse burial. In all the instances produced, we have not had one of a person who had baptized a child schismatically; and if the baptism of a layman is invalid, so is that of a schismatic, who, as in this case, obtains the performance of the rite by his own teacher,—a person who acknowledges that he is not authorized to baptize by his own sect, or by Mr. Wesley, who was a great opponent of lay baptism. Mr. Balley says he has no authority from his own body to baptize. I am sorry to have troubled the Court so long; but I trust the Court will give its serious consideration to the arguments on the one side and on the other. The question resolves itself into this simple proposition—whether the Court, looking at the circumstances under which these canons were passed, can now allow a Dissenter to exhibit articles against a minister of the Established Church for not burying a child who had not received such baptism as the laws of this country tolerate and acknowledge.

[The Court was then adjourned to Wednesday, February 3rd.]

WEDNESDAY, FEBRUARY 3rd.

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Dr. *Harding*.—It now becomes my duty, on behalf of Mr. Escott, to offer a few observations by way of reply to the arguments of my learned friends, and then to state the view which I think it incumbent on the Court to take on this question.

My learned friends, the Queen's Advocate and Dr. Haggard, observe that though it is true that we have not, by our plea, stated that any alteration took place in the Church as to lay baptism till 1603, yet that in order to understand what then took place, it is necessary to go back further; and accordingly Dr. Haggard took us back as far as the Excerpts of Ecgbiht, in the ninth century. The Queen's Advocate contented himself with taking us to the Prayer Books and Rubric of Edward the Sixth. But as to this part of the case, the difference between my learned friends on the other side and ourselves on this point, as it seems to me, amounts to nothing at all. We do not dispute, but we put it on record in our plea, that up to the time of the alteration of the rubric in the reign of James, the Church of England tolerated lay baptism. What does all that has been adduced on this part of the subject amount to? Merely to this, that up to that time the Church did tolerate lay baptism. And what species of baptism was this? Baptism administered in cases of necessity, by laymen within the pale of the Church. I think all the authorities my learned friends have produced from these earlier periods do not carry it further than this, “When they find any *dying*,” say the Excerpts of Ecgbiht. “Of them that be baptized in private houses *in time of necessity*,” says Edward the Sixth's rubric. The necessity is, in all cases, a positive condition of the toleration of lay baptism by the Church; it was only on that ground that its administration was permitted. This is apparent from the passages which have been quoted by my learned friends. Dr. Haggard said, “If the Church, “therefore, tolerated lay baptism in cases of necessity, it clearly “shows that in any case lay baptism must be valid.” This seems an extraordinary proposition, against the correctness of which I protest. The Court knows, for instance, that in many instances

memoranda of wills made *in extremis* are allowed to have effect ; and in criminal courts the dying declarations of parties are frequently admitted ; but it cannot be contended that these things, which from necessity are allowed to have validity and force, are to have such force when no necessity exists. So if the Church, when any were found dying unbaptized, allowed laymen or women to administer baptism, it cannot be contended that baptism by laymen or women never could have been considered invalid by the Church. I say it was considered invalid in every instance where there was not necessity ; because it was on the ground of necessity alone that it was ever tolerated.

In the earliest ages of the Church, lay baptism was unknown altogether. When the notion of the absolute necessity of baptism to salvation sprung up, lay baptism followed as a matter of necessity. As it was thought no child could have salvation that had not received baptism, the Church first tolerated, and then gave indirect sanction to, lay baptism, in cases of necessity alone, and always by persons within the pale of the Church.

Then my learned friends proceeded to comment upon the twelfth article of the Convocation of 1575. They seem to insist, in the first place, that this article was never published at all. They throw every possible doubt they can upon the very existence of this article ; and, on that part of the case, they were very ingeniously followed by Dr. Nicholl. They seem to doubt the fact of its even having been drawn up ; then they say, if it was drawn up, it was not published ; and, if it was published, they assert it could not be of binding force, because it had not received the royal assent. We do not seek to give such an effect to this article, as to say that it settled the question at once, but only that it received the royal assent, and was a positive declaration of the opinion of the Church at that time on the subject. The Preface to the Prayer Book directed the bishops to resolve any doubts on the subject of the interpretation of any of the words or passages of that book ; and we here find the bishops resolving such a doubt. We do not say it was a settlement of the question ; but certainly it was an indication of a considerable change of opinion on the subject. Dr. Nicholl said, on this part of the subject, that the bishops were only allowed to solve these doubts, each in his own diocese. He says that in this case all the bishops acting collectively assumed to solve this doubt ; and

that as, from what we know of the proceedings, it does not appear that a doubt on this subject had been suggested to them in their collective capacity by any of their clergy, they were assuming a power which they could not legally exercise. That observation might have considerable effect if we had relied upon this as a conclusive indication of the opinion of the Church,—if we had said that it settled the question. But all we say is (and I think all the ingenuity of my learned friends cannot disprove it) that here is an indication of considerable doubt existing in the minds of a number of persons as to the validity of lay baptism, and here are all the bishops assuming to settle that doubt. And how do they settle it? Nothing can be stronger or more decided than the way in which the bishops express themselves on the question. They do everything in their power to discourage and discountenance lay baptism. My learned friends say they do not declare it null and void,—that they should have gone further, and declared that no layman should baptize at all. We do not put the matter in that way ; we merely say that a doubt existed in the minds of a considerable portion of the Church, and that the bishops resolved it in our favour.

Sir HERBERT JENNER.—You do not put this as an order of Convocation ?

Dr. *Harding*.—I do not put it as an order of Convocation. It is an order of only one House of Convocation.

Sir HERBERT JENNER.—And a Convocation of one province only.

Dr. *Harding*.—Therefore I do not think I should be justified in putting it to the Court as an order of Convocation.

Sir HERBERT JENNER.—I thought Dr. *Phillimore* put it as an order that was decisive.

Dr. *Phillimore*.—It seems to me that it was positively printed with the other orders of Convocation at that time.

Sir HERBERT JENNER.—Was this an order of Convocation ?

Dr. *Phillimore*.—I do not take this order as laying down the rule of what was done at that time ; but as indicative of the feeling then prevailing,—of the intention to return to a better state of things, and as expressing the sense of the bishops of the province of Canterbury.

Dr. *Harding*.—My learned friends insisted upon what took place at the meeting of the bishops at Lambeth, and at the Convocation

in 1712. Now, if my learned friends put great faith in this—and they seem to rest great part of their argument on what took place in 1712—we are justified in resting our argument on what took place in 1575. The two cases seem to me precisely similar: neither of them is a conclusive settlement of the question, but each is the act of the bishops in their own house, with very considerable unanimity. As to this Convocation of 1575, I think my learned friend Dr. Nicholl strangely argues that, allowing the bishops individually to have a legal right to solve a doubt suggested to them by their clergy, yet that all the bishops together, sitting in their House of Convocation, could not assume the existence of a doubt, and solve that doubt. It is clear, I think, from what occurred in 1575—though it is not directly mentioned that doubts were communicated to the bishops, or what those doubts were—it is clear, I think, that they would not have resorted to such a proceeding as the drawing up this article, unless there had been some necessity for it, and unless doubts had actually arisen which they thought entitled to some consideration.

The Queen's Advocate referred us to the Conferences at Hampton Court, and quoted from the accounts given us by Dr. Montague and Dr. Barlow; and it is a little remarkable that, though my learned friend cited the authority of Archbishop Whitgift, when he thought it favourable to his case, the moment he came to a statement of the archbishop which he thought unfavourable to him, he stopped short, and said, "It is evident the archbishop was wrong 'here,'" or "It appears the reverend prelate does not express 'himself here with his usual accuracy.'" But on that occasion Archbishop Whitgift maintained that the Book of Common Prayer, as it then stood, did not authorize lay baptism at all. He and King James held a discussion on the point. Whitgift maintained that the rubric of Edward the Sixth never was intended to authorize lay baptism. The opinion of the archbishop on that occasion clearly was, that nothing in the rubric of Edward the Sixth authorized it at all; and that, even if it did, yet that it was censured by the bishops. My learned friend says this could not be a final settlement of the question, for we find that frequently afterwards midwives administered baptism. But this was only in the cases in which, from early times, the Church had tolerated baptism by lay persons, namely, in cases of necessity; and whenever the writers

quoted by my learned friends speak of lay baptism being valid, they mean only in cases of the most urgent and pressing necessity.

“ Then,” say my learned friends, “ King James altered the rubric, “ but without any authority ; what he did was not binding.” I do not know how my learned friends are prepared to support that position. I am not satisfied that King James the First, as the head of the Church, had not a perfect right by his proclamation, after due consultation with the archbishops and bishops, to alter the ceremonies of the Church. But although they contend that James the First had no authority to make these alterations, they rely upon them and argue upon them when they seem favourable to their case. All we put on record in our plea is, that from that time *the Church* never tolerated lay baptism ; it has been denounced since that time by the Church as invalid. And from the time of James the First, *the Liturgy* of the Church at all events has never tolerated lay baptism.

My learned friends have alluded to the proceedings at Lambeth, and afterwards in the Upper House of Convocation, in 1712. The Queen’s Advocate read from Burnet’s “ History of his Own Times,” a passage stating that “ another conceit was taken up, of the invalidity of lay baptism.” As to this expression, “ another conceit,” it is of course merely the expression of Bishop Burnet’s individual opinion. He has written, in a very amusing gossiping style, a book which is strongly tintured with his own views upon church and state policy ; and his view was, that this idea of the invalidity of lay baptism was a “ conceit.” We ascertain from another work of Bishop Burnet, quoted by my learned friend, what was his opinion of lay baptism. “ We have reason to believe none ought to baptize “ but persons lawfully ordained ; yet since there has been a practice “ so universally spread over the Christian Church, of allowing the “ baptism, not only of laics, but of women to be lawful, though we “ think this is directly contrary to the rules given by the apostles ; “ yet since this has been in fact so generally received and practised, “ we do not annul such baptisms, nor rebaptize persons so baptized ; “ though we know that the original of this bad practice was from an “ opinion of the indispensable necessity of baptism to salvation.”\* Here Bishop Burnet himself admits that the practice is “ directly “ contrary to the apostles’ rules,” and he himself condemns it as a “ bad practice.” But when this “ conceit” was taken up, Burnet

\* Burnet on the Articles, Art. xxiii.

tells us, " The bishops thought it necessary to put a stop to this " new and extravagant doctrine." " So a declaration was agreed to, " first against the irregularity of all baptism by persons who were " not in holy orders ; but that yet according to the practice of the " primitive Church, and the constant usage of the Church of Eng- " land, no baptism (in or with water, in the name of the Father, " Son, and Holy Ghost) ought to be reiterated. The Archbishop " of York at first agreed to this ; so it was resolved to publish it in " the name of the Bishops of England. But he was prevailed on to " change his mind ; and refused to sign it, on the ground that this " would encourage irregular baptism. So the Archbishop of Can- " terbury, with most of the bishops of his province, resolved to offer " it to the Convocation. It was agreed to in the Upper House, the " Bishop of Rochester only dissenting. But when it was sent to the " Lower House they would not so much as take it into considera- " tion, but laid it aside ; thinking that it would encourage those " who struck at the dignity of the priesthood."\* Now here is the sum and substance of what was done at Lambeth. The bishops talked the matter over, and determined to publish a declaration signed by all the bishops, not intending it as an act of the Convocation, but a declaration of the opinion of the bishops. The Lower House, however, would not so much as take it into consideration. And yet my learned friends lay great stress upon this, as clearly indicative of the opinion of the Church of England at that time. Now if they are entitled to lay stress on these proceedings in 1712, surely we are entitled to lay a much greater stress on the proceedings in 1575, for this reason—in 1712, the bishops, when they had agreed to the declaration, sent it down to the Lower House, who refused to take it into consideration ; while, in 1575, it does not appear that the bishops sent down the article to which allusion has been made to the Lower House at all, and we do not find that any individual in the Church, lay or ecclesiastical, ever made any protest against it.

My learned friends have alluded to the practice of the Church, and have remarked that the Church has been in the constant habit of reading the burial service over persons who were well known to have been baptized by laymen. I think an argument founded upon the practice of the Church in a matter of this kind, is to be received with considerable caution by the Court ; because the Court must be

\* Burnet, Hist. Own Time, folio p. 605.

aware that there are many practices directly contrary to the rubric which are unfortunately very general in the Church. But because these practices are often indulged, it is not to be contended that they are to acquire a legal validity ; and that this Court is to recognize an infraction of the law, and make the very infraction a rule, instead of the law itself. I may mention, as instances, the prayer before the sermon, which is hardly ever in the terms prescribed by the 55th Canon ; and the reading of the Communion Service from the reading-desk. There are, also, other practices, which, though in frequent use, this Court could not recognize.

Dr. Haggard read many passages from the judgment in *Kemp v. Wickes*, upon which he remarked ; and he also cited several passages from Bishop Fleetwood, whose arguments, he said, were most convincing. But I respectfully wish to dismiss Bishop Fleetwood with one observation, that he is simply a controversial writer. I do not object to his opinions being read ; but it is not to be contended that we are to answer all the arguments he used, in the course of the controversy in which he was so long engaged. His statements are not indicative of the opinion of the Church, or of any part of it, but merely of his own individual sentiments.

Then Dr. Nicholl says, in the first place, that in this case they do not set up any necessity for this baptism. From something which fell from the Court during the argument, I understood the Court to be of opinion that there was a case of necessity disclosed, upon the evidence that the child was extremely ill when baptized by Mr. Balley. But, as my learned friends admit that the baptism was not administered in a case of necessity, I am sure the Court will not take notice of that, for they distinctly repudiate the necessity, and say they do not wish to rest their case upon it.

Dr. Nicholl then says that, by the general law and custom of England, every person, at common law, is entitled to be interred in the churchyard of the parish in which he dies. That is a position which we do not dispute, which we never attempted to question. A most erroneous impression indeed very generally prevails that the question here is as to the right of Dissenters to be laid in consecrated ground, as to which we have never suggested the slightest doubt. In fact this unhappy little child was buried in the churchyard. But whether any service is to be read over the body, is a matter of purely ecclesiastical determination. In the case of the

King against Coleridge, 2 Barnewall and Alderson, page 808, Chief Justice Abbott says "I am of opinion that the mode of burial is a 'subject of ecclesiastical cognizance alone.'" And Mr. Justice Holroyd says "It seems to me that the mode of burial is as much 'a matter of ecclesiastical cognizance as the prayers that are to be "read or the ceremonies that are to be used at the funeral.'" The reading of the service is a purely ecclesiastical ceremony. No Court of Common Law would attempt to enforce the reading of the burial service. All that the body of any person dying within a parish has a right to at common law is decent interment in the parish church-yard. The common law is perfectly silent as to what service shall be read over the body, or as to whether or no any service at all shall be read.

My learned friend then asks if it is contended, after the passing of the Toleration Act, that this child is excommunicated? We do not contend for this. But the question is, whether Mr. Balley, who baptized the child, was not excommunicated and out of the pale of the Church, in the ecclesiastical sense. He might not be subject to any civil disability; *ipso facto* excommunication is at an end, so far as regards the infliction of civil disability; but I have yet to learn that, *for ecclesiastical purposes*, *ipso facto* excommunication is at an end. We do not say this excommunication affects the committee of the Wesleyan Conference, who are prosecuting this suit, or Mr. Balley, or any members of that body, as it respects civil disabilities; but it is a question for this Court, whether ecclesiastical excommunication *ipso facto* does not yet exist, and whether, by virtue of these canons, Mr. Balley has not been, ever since he professed himself a Wesleyan, out of the pale of the Church of England.

Then my learned friend, Dr. Nicholl, very ingeniously argued, ' Do you mean to say that a 'lawful minister' is absolutely essential to the administration of baptism? that baptism administered by "those who are not 'lawful ministers'" is null and void?' My learned friend read a passage from Waterland, from which it clearly appeared that heretical baptisms had, in all cases, been acknowledged, because they were administered by priests. Now, as to these baptisms, administered by priests who were heretical, Dr. Waterland says, in the passage quoted by my learned friend, that in them are "all the *essentials* of baptism, water, *commission*, and form."

It is evident, therefore, that Dr. Waterland thought the "commission" of the priest one of the essentials.

Then my learned friend attacked us for the manner in which we have proceeded in this cause, for our not having conducted it in a manner similar to that adopted in Kemp and Wickes; and he gave us a great deal of good advice as to not causing excitement and animosity. One advantage of this advice is, that we are not obliged to follow it. The case of *Kemp v. Wickes* is not a precedent for us; this is a criminal suit, and instead of raising objections to the admission of the articles, we took the chance of how the evidence might turn out. Some of the evidence is very important. How could we, for instance, have expected Mr. Balley to say "that he "conceived he was not authorized to administer the sacrament of "baptism?" The Court will not, I am confident, think that we are open to any animadversion for merely conducting our defence in a criminal suit according to the usual and ordinary forms of proceeding.

"Then," says my learned friend, "see what dreadful consequences will follow from the establishment of your doctrine. Do you mean to say that all persons baptized in Germany and Scotland, that the scions of the illustrious house of Saxe Coburg are "to be told they are not members of the Church of Christ?" We do not attempt to tell them any such thing. The question here is, not whether these persons are or are not members of the Church of Christ, but whether they are members of our own Church—of the Church of England as by law established in this country. If not, what right can the fact of their being members of the Church of Christ give them to have the burial service of the Church of England read over their remains? What legal right can it give them.—How can they enforce that right in any Court of Law? My learned friend's idea of a Church seems to resemble that of a popular modern Poet, who says

" What is a Church ? let Truth and Reason speak,  
" They would reply—"The faithful, pure and meek  
" From Christian folds the one selected race  
" Of all professions, and of every place.' "

The existence of this great invisible Church we are not here to question. I trust that many Wesleyans are members of it, but their being so will not prove them to be members of the visible Church of England.

Then, it is urged, that the rubrics of the Prayer Book of Edward VI. were drawn up by many of the same persons who were engaged in framing the Articles ; and, therefore, my learned friends contend that it is impossible that the Article on which we rely can have the operation we seek to give it. This would have been a good argument if we had insisted—which we do not—that the Thirty-nine Articles are conclusive or decisive on the question. We merely alluded to the Articles in our plea, to show the inclination of the Church generally,—to prove that there was nothing in the Articles of the Church peculiarly favourable to the administration of lay baptism. The Court must bear in mind that we did not insist that any of the Thirty-nine Articles did expressly forbid lay baptism, or declare it invalid.

Then, as to the Article of Convocation to which I have before alluded—the 12th Article of 1575—my learned friend observes, that it does not say that lay baptism shall be null and void ; and he is inclined to think that the publication of this Article was suppressed because it was not lawful,—because it was an excess of power on the part of the bishops, in meeting together collectively, and assuming to make this declaration. I answer to this, that we do not say this Article settled the law, but we say we may claim for it as much weight as my learned friends claim for the proceedings of Convocation in 1712. We show by it that serious doubt had existed in the Church as to the administration of lay baptism, which doubt the bishops in their House of Convocation decided in favour of that view of the case for which we contend.

My learned friend then proceeded to make some remarks upon the controversy which took place between Cartwright and Archbishop Whitgift ; and he cited a passage from Whitgift, from which he inferred that that prelate was in favour of lay baptism. That, however, is merely an indication of the individual opinion of the archbishop ; and his opinion on this point is not entitled to so much weight as it might, perhaps, be entitled to upon many points, for he contended before James I. that the rubric did not authorize the administration of lay baptism at all. Therefore, any observation of his inferring that he thought the Church of England did recognize lay baptism, must be taken along with the consideration of the opinion which he propounded and stubbornly supported before King James.

My learned friend then proceeded to say to us—"As to your "saying that dissent, at this time, was not tolerated, it is pretty "clear that if it did not exist, something very like it did." To prove the existence of dissent, he read to us the resolutions of the Synod of Puritan ministers at Coventry, from Fuller's *History*. I do not know what force my learned friend can attach to that. It is clear there were Synods at which Puritan ministers met to discuss many points—as they have ever been fond of doing—which the world in general is ready to take for granted, but many of these were ministers, benefited ministers, of the Church. What my friend calls the Synod of Coventry was, I apprehend, a meeting of ministers of the Church, in which they passed certain resolutions, he says, bearing a great similarity to the doctrines of the Dissenters. But I am sure my learned friend will not contend, that at this period dissent had any legalized existence whatever. Legally speaking, there was then no dissent. From all the acts of the Church—from all the rubrics—from the alteration of the rubric of James I. at the Conferences of Hampton Court—it must be taken for granted that every "minister," in those times, was a lawful minister of the Church of England. The law did not, as it does now, recognize the existence of any other "ministers" than ministers of the Church.

My learned friend then argued, that though the rubric of the Liturgy does require certain forms to be observed to render a baptism valid, it does not disannul and render invalid baptisms done without those forms. We do not contend that any particular word, or phrase, or sentence, or expression in any rubric, at any time, settled this question at once. But we say that the rubrics, as well as the decisions in Convocation, and the other authorities we quote, when taken altogether—considered as one long series—clearly show the opinion of the Church to be against the validity of lay baptism. My learned friend, I am sure, will be ready to admit, that in cases of statutes, though a single statute, requiring a compliance with certain forms in order to make a thing valid, may not at first, *proprio vigore*, make the same thing if done without these forms invalid, yet if we find a long and uniform series of statutes to the same effect, the Court will decide in accordance with their general purview and policy.

My learned friend then referred to the point that James I. had

no authority to make these alterations in the rubric. But whenever he found anything in these alterations which he thought favoured his views, he admitted their authority without scruple. I think the Court and my learned friends will see that the alterations then made were most important. Their tendency is quite clear. The only difference on the subject is, as to whether they were final and conclusive. My learned friends can hardly deny that the general tendency of the alterations was decidedly against them,—that James was most anxious to discountenance and discourage lay baptism; and that the whole object and purport of what was done, was as much as possible to discourage, and discountenance, and forbid altogether, the administration of lay baptism.

“Then,” says my learned friend, “it is remarkable that the “canons do not notice these alterations of James I.” Now it seems to me that the canons do recognize them, particularly one canon, to which I shall refer the Court. This is a remarkable canon, because in it an indirect reference is made to the alteration. I allude to the thirtieth canon, explaining the lawful use of the cross in baptism. Towards the conclusion of this canon it is said—“The “Church of England, since the abolishing of popery, hath ever held “and taught, and so doth hold and teach still, that the sign of the “cross used in baptism is no part of the substance of that sacrament; for when the *minister*, dipping the infant in water, or “laying water upon the face of it (as the manner also is), hath “pronounced these words, I baptize thee in the name of the Father, “and of the Son, and of the Holy Ghost, the infant is fully and perfectly baptized.” There is here a distinct allusion, I apprehend, to the alteration made by King James; because, in the rubric of Edward VI. baptism is not directed to be performed by a minister, but by “one of them that be present.”

*The Queen's Advocate.*—The use of the cross is merely in public baptism.

*Dr. Harding.*—The Court must remember that it is part of our argument that, at the time the canons were framed, dissent had no legal toleration or existence; and it is evident, therefore, that the canons are not so definite and stringent upon many points as they would have been if they had been drawn up at the present day.

My learned friend then came down to the Savoy Conference, and the discussions preceding the final alteration of the Book of

Common Prayer. At that time the Dissenters were most anxious, as it seems to me, to prevent the administration of baptism by any but lawful ministers. In Cardwell's History of Conferences, page 356, he gives this as one of the objections then urged by the Dissenters—"We desire that baptism may not be administered in a "private place at any time, except by a lawful minister." The bishop's reply, alluding to the "private place:" "And so do we, "where it may be brought into the public congregation; but since "our Lord hath said, 'Except a man be born of water and the "Holy Ghost, he cannot enter into the kingdom of heaven,' we think "it better they should be baptized in private, rather than not at all. "It is appointed now to be done by the lawful minister." My learned friend remarked that this seemed to be a waving of the question,—a getting out of the difficulty without settling it. I do not put this construction upon it. The objection was made by the Dissenters of that day against the Church, and the bishop's answer,—"It is appointed *now* to be done by the lawful minister,"—is as much as to say, "We cannot even see the meaning of the objection "as to the lawful minister."

My learned friend then alluded to Archbishop Laud, and adverted to the way in which he treated this subject in the Liturgy he drew up for the use of the Church of Scotland. This, however, was done before the alteration of the rubric in 1662, and it is only the indication of the opinion of a single prelate, even if the Court should be of opinion that it makes so much against us as was contended.

He proceeded to comment with great force on what he conceived a new and important branch of the argument—the alterations in the Book of Common Prayer adopted by Convocation, with which Archbishop Sancroft and Bishop Cosin were so much concerned. My learned friend read, from Nicholls's Common Prayer, page 67, of the "Additional Notes on the Book of Common Prayer." [Dr. Harding here read the passage which had been previously quoted from this work by Dr. Nicholl.\*] From this paper, supposed to be drawn up by Bishop Cosin, Dr. Nicholl infers that the attention of the Convocation must have been called to this point. The Court will see what this amounts to. Here is a paper drawn up by Dr. Cosin. It is not exactly known when it was drawn up, or

\* Vide *supra*, pp. 91, 92, where the passages are inserted.

with what view. Nicholls thinks the reviewers had great regard for these remarks, and that it is probable they were laid before the Board. They are, however, the remarks of only one single person, and we have no means of knowing how they were pressed upon the attention of the Board. We do not know whether these suggestions were read over one by one, or whether they were only partially submitted. When this is pressed against us as legal evidence, I must say I think it is the loosest and lightest kind of evidence ever attempted to be adduced in a criminal suit in this Court.

My learned friend then adverted to what took place in 1712. As to this, I shall merely observe that the bishops intended to publish a declaration, but from this course the Archbishop of York dissented. The Archbishop of Canterbury, and his bishops, brought the subject forward, and the Lower House of Convocation refused to take it into consideration. I can hardly see, therefore, how it has any weight at all. If my learned friends lay stress upon the bishops of the province of Canterbury attempting to settle the question in a manner in consonance with their views, the weight and importance of that circumstance are removed by the fact that the Lower House would not entertain the subject at all. It is clear they were utterly opposed to it.

My learned friend then says, that during the whole of this controversy we find no allusion to the refusal of burial to persons baptized by laymen,—that this was so monstrous a proposition, that it never entered into anybody's imagination. What is the practice of all other countries and churches on this point? Is the refusal of burial anything so new and strange? What is the practice of the Church of Rome? Does she give Christian burial to persons who are not of her communion? She refuses not merely the services of the Church, but even interment in her consecrated ground. A Protestant dying in a Roman Catholic country cannot be buried in consecrated ground. It is only lately, through our political influence and with much difficulty, that we have gained the privilege of having burial grounds of our own in Roman Catholic countries. To this day, the Roman Catholic Church still excludes from burial all those whom she considers out of the pale of her communion. She constantly insists and acts upon her right to deny not merely the service of the Church, but even a place in consecrated ground. Therefore this proposition is not any thing

very new or strange, though it is designated as startling and monstrous. I am not so deeply read in this controversy as Dr. Nicholl; but taking it for granted that this subject is not alluded to in the controversy, it is, I think, a material consideration for the Court how far its opinion can be influenced by that of the writers in the controversy. For it thus appears that those who were engaged in this controversy, from whom my learned friend quoted at such length, have never considered the only question which the Court is now called upon to decide.

My learned friend then said that the Toleration Act relieved Dissenters, at all events, from all ecclesiastical censures; and that the act since passed, imposing a stamp duty on their baptismal registers, recognizes their legal existence. And "could the legislature," he asks, "sanction what it considered illegal?" But we must not overlook the distinction, that the Toleration Act was passed to relieve Dissenters merely from civil disabilities, and neither that act, nor the act imposing a stamp duty on their registers, can at all affect their ecclesiastical *status*.

My learned friend also says, "A statute was passed directing "that Roman Catholics should be buried with the services of the "Church; notwithstanding that they had been baptized by persons "who were not lawful ministers according to the rubric." The answer is, that this was required by statute; the Church had no authority to resist, and she did not resist; she obeyed the statute, as it did not command a thing that was unlawful. The statute was passed to meet the possibility of this very objection of their not being lawful ministers; and I cannot therefore see how this statute can be pressed as an argument against us in this case.

I have thus attempted, very inadequately, to reply to some of the principal arguments of my learned friends. Before, however, I commence my own argument, there is one objection which has been much pressed against us, and which I shall briefly notice. "Where does the Church of England," it is asked, "ever declare "lay baptism to be null and void? Can you show us a single "passage where the Church says, that persons baptized by laymen "shall be deemed not to have been baptized at all?" We will put another question—Where has the Church ever authorized lay baptism, except in cases of urgent necessity, and by persons within the pale of her own communion? Can my learned friends adduce any one passage from the rubric, or any single instance in point, to

show that the Church of England sanctioned lay baptism at all, except in cases of urgent necessity, where the child was in danger of death?

This is a criminal suit, promoted against Mr. Escott, to punish him for not having read a particular form of words over the body of a child, born of parents who were not members of the Church. My learned friends say that the only question in the case is as to the validity of lay baptism. This may not, perhaps, be an unfair way of stating the case, but this is not the only question. The Court must consider whether it is bound to punish Mr. Escott for having refused to read the service of the Church over—not for having refused Christian burial to—the body of a child which was unbaptized according to the Church. The proceedings in this case are under the sixty-eighth canon. If Mr. Escott is not guilty under that canon, he is not guilty at all. I would remind the Court of the observations of Dr. Phillimore, with respect to the real purport and intention of this canon. He quoted a decision of a Court of Common Law, from which it appeared that a learned judge was of opinion that this canon was a sort of transcript of an ancient canon, the object of which was, to prevent clergymen from delaying burial for the sake of exacting inordinate fees from the friends of the deceased. That, I have no doubt, was the object and purport of the canon.

The sixty-ninth canon reads thus:—"Ministers not to defer "christening, if the child be in danger. If any minister, being "duly, without any manner of collusion, informed of the weakness "and danger of death of any infant unbaptized in his parish, and "thereupon desired to go or come to the place where the said "infant remaineth, to baptize the same, shall either wilfully refuse "so to do, or of purpose, or of gross negligence, shall so defer the "time, as, when he might have conveniently resorted to the place, "and have baptized the said infant, it dieth, through such his de- "fault, unbaptized; the said minister shall be suspended for three "months." Now supposing lay baptism was recognized by the Church at this time, how could the state of things, against which this canon was intended to guard, ever have arisen?—any of the bye-standers might have baptized the child. The canon seems clearly to contemplate that if the minister did not attend to the warning given him, the child would die unbaptized. The canon does

not suggest the possibility of any other person administering the baptism. This clearly indicates the intention of the Church, that baptism was only to be performed by the "lawful minister." The seventieth canon requires "ministers to keep a register of christenings, weddings, and burials." This shows that there was then no distinction between Dissenters and Church people. Every christening, marriage, and burial, was to be entered in the register by the minister. The construction the Court is bound to put upon these canons is not, I apprehend, to be founded upon any particular passage in any one of them, or upon any canon by itself; but the Court must take into consideration the object and purport of the whole of the canons. It is impossible for my learned friends to contend that the sixty-eighth canon was intended to punish ministers for refusing to bury children baptized by sectarians. Dissenters then had no legal existence; there were persecutions, even to death, of such persons. My learned friends have at least, therefore, attempted to twist this canon into a meaning which its makers never intended to be given to it. The last thing those who drew up these canons would have thought of is, that under them a minister would be proceeded against for refusing to bury a child baptized by a dissenting preacher. And from Mr. Balley's evidence it appears, that though Mr. Mastin is the nominal promoter of this suit, its real promoters are the Committee of the Wesleyan Conference in London.

My learned friends have introduced into their articles a distinct averment relating to "the class of people called Wesleyans." They have pleaded that this child was baptized according to the rite or form of baptism received and observed among the Wesleyan Methodists, by Mr. Balley, a Wesleyan minister; and that of the fact of this baptism Mr. Escott had notice. I apprehend that it was not absolutely necessary to have introduced any allusion at all to Mr. Balley's being a Wesleyan minister, or to the circumstance that the baptism was performed according to the rites observed by the Wesleyans; but, having introduced these averments, my learned friends must prove them by the same evidence by which they would prove other facts. That is the general rule of law in all courts. The courts hold you to strict proof of your averments. The Court will remember that, with respect to this baptism, we wanted to plead that it was not performed according to the rite or

form generally received and observed among the Wesleyan Methodists. It will be rather hard if we are not allowed to counterplead, and my learned friends are not expected to prove their averment. My learned friends might have treated the case merely as to the question of lay baptism. They have not, however, done so. They have pleaded that the parents of the child were Wesleyan Methodists—that Mr. Balley was a Wesleyan—and that the baptism was performed according to the rite or form generally received and observed among the Wesleyans. As to the father and mother of the child being Wesleyans, it appears that they had been sixteen years resident in the parish, and had been for many years in the habit of going to church; but that for nine months they had attended the Wesleyan chapel. Whatever may be the case here, in other courts, in criminal suits, the proof of these facts would be insisted upon; any possible defect in proof would be very severely commented upon; and the party standing under a criminal charge would have the fullest benefit of any doubt or difficulty which the Court might entertain. As to Mr. Balley, it is pleaded that he is a Wesleyan minister, and that he performed the rite according to Wesleyan usages. Mr. Balley admits that the Wesleyans are persons who follow and admit the authority of Mr. Wesley, in all ecclesiastical matters, completely and conclusively; and he admits, also, the authority of a passage from Mr. Wesley's Sermons,\* stating that for any one to attempt to administer this sacrament would be a recantation of the connexion. All the ministers speak of recognizing the authority of Mr. Wesley; and we find that he told his followers that if they attempted to administer the sacraments, it would be *ipso facto* a recantation of the connexion. If, therefore, it is necessary for my learned friends to prove that these parties were Wesleyans, that Mr. Balley is a Wesleyan minister, and that the baptism was performed according to the Wesleyan rites, this is worthy of observation.

*Dr. Nicholl.*—It is only by the sermons up to sermon 53, or the “Four Volumes,” that the Wesleyans are bound.

*Dr. Harding.*—Mr. Balley distinctly admits the authority of this passage; he “believes it to be true in its facts, and sound in its doctrines,” but he states that they have altered their practice since.

\* *Vide supra*, p. 7.

My learned friends contend they have given strict legal proof, and all that can be required, that Mr. Bailey is a Wesleyan minister, and that he baptized the child according to the rite or form generally received and observed among the Wesleyan Methodists. These Wesleyans say they follow the authority of Mr. Wesley in all things, and yet they admit that he says that if Wesleyan preachers administered the sacraments, it would amount to "a recantation of the connexion and a renunciation of the first principles of Methodism;" how then can it be contended that this was a baptism according to the rite or form generally observed by Wesleyans?"

I do not wish to press this point at any very great length; but I am sure it would, in other courts of criminal jurisdiction, receive the greatest attention from the Court; and if the Court had any doubt whether strict legal proof had been given, it would decide the point in favour of the defendant. My learned friends need not have embarrassed themselves with these questions, but they have chosen themselves to do so. The Court would not allow us to counterplead the article to which I have referred; but it does not therefore follow that it is not incumbent on my learned friends to prove its averments.

Sir HERBERT JENNER.—It was open to you to have appealed from that decision of the Court.

Dr. Harding.—It is a clear principle of law, in courts of civil and criminal jurisdiction, that if you introduce averments, however immaterial, in your declaration or indictment, you must prove them. My learned friends have introduced these averments about Wesleyanism, and I say they have not given that strict legal proof of them which other courts, at all events of criminal jurisdiction, would require.

The next observation I shall offer is with respect to the acts of parliament—the Toleration Acts—which have passed since this canon was framed, which my learned friends, as I understand, contend are to give to this canon a penal effect against the clergy, never contemplated by its makers. My learned friends cannot contend that the makers of the sixty-eighth canon ever contemplated its being tortured into a ground for a proceeding of this kind. They say—" Schismatics then had no legal existence; dissent was unknown legally; but, since that time, various acts of parliament

" have passed, which have so materially affected the condition of " the Dissenters, that they are now able to enforce this canon against " you." If, at the time these canons were framed, any persons had appeared to promote such a suit as this, and admitted they were persons *ipso facto* excommunicated by the twelfth canon, what would have been their situation? They would have had no *locus standi*. But we are told that since then several acts of parliament have passed, which have materially changed the legal position of Dissenters.

The first of these acts is 1 William & Mary, c. 18, for exempting Protestant subjects, dissenting from the Church of England, from the penalties of certain laws. The act enumerates certain laws, from the penalties of which they shall be exempted; but there is nothing in these laws so repealed, and from the operation of which they were exempted, that at all affected their ecclesiastical position with respect to the Church. This act does not preclude the canon by which Dissenters are *ipso facto* excommunicated, from remaining in full force. This act has frequently received legal consideration. In the case of the Attorney-General v. Pearson, 3 Merivale's Reports, p. 405, Lord Eldon says, " In the year 1689 " was passed the act commonly called the Toleration Act, which " exempted certain persons, coming under the description of Pro- " testant Dissenters, from the penalties of certain laws therein " mentioned; and, as I again observe, the object seems to have " been merely as stated in the title of the act \* \* \* \* \* it not " appearing either upon the terms or substance of it to have done " or to have intended to do any more."

Sir HERBERT JENNER.—What was the nature of the case?

Dr. Haggard.—It was, I believe, as to the removal of certain trustees, who did not believe in the doctrine of the Trinity, and the appointment of others.

Dr. Harding.—The next act is the 52 Geo. III. c. 155. That act required the registration of all places of meeting of any congregations of Dissenters for religious worship. And all this act did, was to place persons complying with its provisions in the same situation as persons complying with the act of William & Mary; it exempted them from the penalties of the same laws. I do not see how it affected the position of the Dissenters in reference to the Church, in an ecclesiastical point of view.

We then come to the last act on the subject, the 53 Geo. III.

c. 127, "An Act for the Regulation of Ecclesiastical Courts," and which abolishes excommunication, as I contend, merely as it affects civil disability. The Court has stated its opinion that this act was intended to do away with excommunication altogether, in a civil point of view. I think this is the only act which materially bears upon the question; and I apprehend all the Court decided the other day was, that it abolished excommunication in a civil point of view—that we shall not be allowed to say that the party promoting the office of the judge is excommunicated by a canon, because that would inflict civil disability. But this act, as I apprehend, does not at all interfere with the ecclesiastical position of Dissenters. It cannot put those within the pale of the Church, whom the Church considers without its pale.

Sir HERBERT JENNER.—All I decided was, that Mr. Mastin was not under such a civil disability as could prevent him from promoting the office of the judge in this suit.

Dr. Harding.—Did the Court rest its decision upon this act?

Sir HERBERT JENNER.—I thought that act was quite sufficient for the purpose of placing Mr. Mastin in a situation to promote the office of judge.

Dr. Harding.—I put the case thus. Here is a canon, speaking with the voice of the Church, and saying that persons who deem it lawful to do certain things are *ipso facto* excommunicated. We put the question to the witnesses, whether the Wesleyans were parties who did those things. I see my learned friend smiling, at finding, I apprehend, that a blacksmith and a farmer were called upon to put an interpretation on a canon. But Mr. Balley and Mr. Bond, who have been educated as Wesleyan ministers, and who probably did not, on this occasion, see the canon for the first time, admit that it applies to them. All the witnesses admit this; and is not that sufficient to satisfy the Court of the correctness of this representation of the state of the Wesleyans. Here are two of their ministers, a class-leader, and other Wesleyans, admitting in the most express words that they come within the canon;—this canon stating that persons doing certain things are excommunicated *ipso facto*—that they are no longer members of the Church of England;—whether they are members of the universal Church of Christ is not the question for discussion. Mr. Balley says, "I do admit " that the Wesleyans do in fact, as a body, affirm, that it is lawful

“ for ministers and lay persons to join together and make rules, “ orders and constitutions in causes ecclesiastical without the “ Queen’s authority, and submit themselves to be ruled thereby.” Will my learned friends, in their reply, direct their attention to this question? How can Mr. Balley, admitting himself to be out of the pale of the Church of England, admit another person into it? How would it be with respect to any other society, institution, or corporation in the kingdom? Mr. Balley in fact says, “ I am already “ excommunicated *ipso facto*; I am out of the pale of the Church “ of England;” he says in express words “ I have no authority to “ administer the sacrament of baptism.” And yet my learned friends contend, that he has, by his administration of the sacrament, admitted this child into the bosom of the Church; and that so validly and effectually, as to make it penal for the minister of the parish to refuse to read the burial service over its remains. I think this is an objection which must strike every one, and which my learned friends will have to get over in their reply.

But we now come to the opinion of the Church of England on the subject of lay baptism; and on this point my learned friends have rested almost their whole case. We must bear in mind, as they seem to admit, that there is nothing in Scripture in favour of the principle. Even Bishop Burnet admits that it was “ directly “ contrary to the apostles’ rules:”—we know it was contrary to the practice which existed in the earliest ages:—we know that the Church of Rome only allowed it in cases of necessity. The reformation in England was very gradual; it was not accomplished at once, by the publication of the Thirty-nine Articles: and the Church of England, it is clear from the rubric of Edward VI., from the first allowed this practice, as the Church of Rome had done, only in cases of necessity. There is nothing in the Articles of the Church by which my learned friends can prove it to be admitted. The nineteenth Article says—

“ The visible Church of Christ is a congregation of faithful men,  
 “ in the which the pure Word of God is preached, and  
 “ the sacraments be duly ministered according to Christ’s  
 “ ordinance in all those things that of necessity are requi-  
 “ site to the same.”

We here see the great importance which the Church attaches to the *due* administration of the sacraments, according to Christ’s

ordinance. In the twenty-third Article the Church expressly declares, that it is not lawful for any man to take upon him the office of "ministering the sacraments in the congregation, before he be lawfully called and sent." The twenty-sixth Article says—

" Although in the visible Church the evil be ever mingled  
" with the good, and sometimes the evil have chief autho-  
" rity in the ministration of the Word and Sacraments ;  
" yet forasmuch as they do not the same in their own  
" name, but in Christ's, and do minister by his commis-  
" sion and authority, we may use their ministry, both in  
" hearing the Word of God, and in receiving of the Sacra-  
" ments."

It was not lawful for any man to take upon him the ministry of the Sacraments, till this "commission and authority" was given to him. We see, therefore, nothing in the Articles that can be tortured into any sort of extension of the practice of lay baptism, which was confined strictly to cases of necessity. There is nothing in the Articles to put the practice on a different footing to that on which the Church of Rome had put it.

Then with respect to what happened in 1575, it is clear that considerable doubt arose, and that the bishops assumed to settle that doubt ; and they certainly settled it in a way immediately in favour of our argument.

Then, in 1604, the Hampton Court Conference took place ; and Archbishop Whitgift contended before King James that the rubric, as it stood then, did not sanction the performance of baptism by laymen or women. He thought the minister was then necessary to the performance of baptism according to Christ's ordinance. "It is not," he says, "inferred from the rubric that laymen have the power to do it." My learned friends must admit that the alteration in the rubric in the time of King James, by the introduction of the words "the lawful minister," was, at any rate, evidence of the gradual leaning of the Church against lay baptism. What was done by James and the bishops, was against and not in favour of lay baptism. And though I am averse to quoting individual authorities, I trust I may be excused for quoting two very eminent persons, who wrote about this time, the one a layman, the other a clergyman. Bacon, in his Treatise On the Pacification of the Church, says "For private baptism by women, or lay persons, the best divines do

“ utterly condemn it ; and I hear it not generally defended ; and I  
 “ have often marvelled, that where the book in the preface to public  
 “ baptism doth acknowledge that baptism in the practice of the pri-  
 “ mitive Church was anniversary, and but at certain times ; which  
 “ sheweth that the primitive Church did not attribute so much to  
 “ the ceremony, as they would break an outward and general order  
 “ for it ; the book should afterwards allow of private baptism, as if  
 “ the ceremony were of that necessity, as the very institution, which  
 “ committed baptism only to the ministers, should be broken in re-  
 “ gard of the supposed necessity. And therefore this point of all  
 “ others I think was but a ‘ Concessum propter duritiem cordis.’ ”\*  
 Jeremy Taylor, in his “ Ductor Dubitantium,” Book III. c. iv. Rule  
 15, says “ It was a custom in many Churches anciently, and not long  
 “ since in the Church of England, that in cases of the infant’s ex-  
 “ treme danger, the midwives did baptize them. This custom came  
 “ in at a wrong door, it leaned upon a false and superstitious opinion,  
 “ and they thought it better to invade the priest’s office, than to trust  
 “ God with the souls which he made with his own hands and re-  
 “ deemed with his Son’s blood. But this custom was not to be  
 “ followed if it had still continued ; for even then they confessed it  
 “ was sin, *factum valet, fieri non debuit*, and evil ought not to be  
 “ done for a good end. This custom therefore is of the nature of  
 “ those which are to be laid aside. ‘ No man baptizes but he that  
 “ is in holy orders,’ said Simeon of Thessalonica ; and I think he  
 “ said truly.”† It is clear, then, I think, that, up to this time, there  
 was a general tendency to discourage the administration of lay  
 baptism. The whole of the ecclesiastical authorities are rather  
 against it.

But the Court knows what great influence upon religious opinion in England, during these early times—from the Reformation, at any rate, till the restoration of Charles the Second—the opinions and practices of foreign Protestant Churches exercised. Their decisions were listened to with the greatest respect ; they were often quoted ; and it was a great object with a large party in the Church, to form the Church of England on the model of some of the foreign Churches. The Court may remember that in Butler’s Hudibras,

\* Bacon’s Works by Montague, vol. vii. p. 82.

† Taylor’s Works by Heber, 1839, vol. xiv. p. 49.

though, perhaps, not a very good authority to quote in a case like the present, he refers to this circumstance in the lines—

“ And alter all things on the mode  
Of Churches best reformed abroad.”

In the Confession of Augsburg, Article 14, we find it said—“ *De ordine Ecclesiastico docent, quod nemo debeat in Ecclesia publicè docere, aut Sacra menta administrare, nisi ritè vocatus.*” Melancthon, in his “ *Apologia Confessionis*,” remarks on the 9th Article of this Confession (which relates to baptism), “ *Certissimum est quod promissio salutis pertinet ad parvulos. Neque vero pertinet ad illos qui sunt extra ecclesiam Christi, ubi nec verbum nec sacramenta sunt, quia regnum Christi tantum cum verbo et sacramentis existit.*” The Protestant Church of France goes further. Its regulations were founded upon Calvinistic doctrines. The authority of Calvin is, at all events, higher than any of the individual controversial writers whom my learned friends have quoted. Calvin says, in his “ *Institutes*,” Book IV., cap. 15, s. 20. “ *Hoc etiam scire ad rem pertinet, perperam fieri si privati homines baptismi administrationem sibi usurpent; est enim pars ecclesiastici ministerii tam hujus quam cœnæ dispensatio. Neque enim mulieribus aut hominibus quibuslibet mandavit Christus ut baptizarent, sed quos apostolos constituerat iis mandatum hoc dedit.*” And at the end of s. 22 he says “ *multo igitur sanctius est hanc Dei ordinationi reverentiam deferre ut non aliundè sacramenta petamus quam ubi Dominus depositit. Ubi ab ecclesiâ sumere non licet, non sic illis allegata est Dei gratia quin eam fide ex verbo Domini consequamur.*” Calvin here lays it down distinctly, that he thought it better to allow children to die unbaptized, than that the ordinance should be administered in a way which Christ had not commanded. He did not permit the administration of lay baptism, even in cases of the most urgent necessity. The Protestant Church of France naturally adhered to this opinion of her great teacher. In the Book of Discipline of the Church of France, cited in Quick’s *Synodicon in Galliâ Reformatâ*, vol. i. Introduction, p. 46, it is declared that “ *baptism administered by an unordained person is wholly void and null.*” And in the same work, Chapter VI. s. 13, it will be seen that as early as A. D. 1560, the Synod of Poictiers, in answer to the question “ *Ought they to be rebaptised who are baptised by monks?*” declared that “ *Baptism administered by one destitute*

“ of commission and calling is altogether null ; and as monks have “ no calling from the Reformed Church, or elsewhere, such as have “ been baptized by them ought to be rebaptized.”

The Church of Scotland, in the “ Confession of Faith” approved by the General Assembly in 1647, and ratified by act of Parliament in 1649, says that neither baptism nor the supper of the Lord, “ may be dispensed by any but by a minister of the Word, law-“ fully ordained.” [c. 27, sec. 4.] In “ The Directory for the “ Public Worship of God ” of the same Church, in the part headed “ Of the Administration of the Sacraments ; and first, of Baptism,” it is said that “ baptism, as it is not unnecessarily to be delayed, so “ is not to be administered in any case by any private person, but “ by a minister of Christ.”

Bearing in mind that the opinion of the Church of England, ever since the Reformation, had been gradually leaning against lay baptism,—and that the Protestant Churches of France and of Scotland settled the question by following Calvin’s principle, that baptism is not to be administered except by a minister lawfully ordained,—bearing this in mind, is it very extraordinary that, when the next alteration was made in the services of the Church of England, the same principle should be followed ? Is it any thing very strange or surprising that our Church should then insist, more strongly than before, upon the necessity of baptism by a lawful minister for admission within her pale ? Was it not rather to be expected that on the next occasion on which the services of the Church were altered, we should find a prohibition inserted against reading the service of the Church over the bodies of those who were not considered as members of the Church, because they had been baptized by persons who were not themselves members of the Church, and who did not even pretend (as in this case) to have any authority to administer the sacraments ?

But before we enter upon the consideration of the alterations which took place in 1662, in the rubric before the Burial Service, let us see what was the former state of things with respect to the burial service, and the rites of burial. Church-yards had their origin in the Romanist notion of the efficacy of prayers for the dead ; they were established in order that, when the friends of deceased persons passed their tombs, they, being so put in mind of them, might

offer up prayers, which were supposed to be of great efficacy. And, from the earliest times we therefore find, that the churchyards were appropriated solely to the reception of the "fideles," or faithful members of the Church. In Bingham's *Antiquities*, Book xxiii. c. 3, we find this passage : " Another sort of persons, to whom the " Church denied the privilege of solemn burial, were, all excommunicated persons who continued obstinate and impenitent in a " manifest contempt of the Churches discipline and censures ; " under which denomination all heretics and schismatics that were " actually denounced such by the censures of the Church were " included." The Church, I apprehend, has the power of censuring collectively, as well as an individual offender. A person will be actually denounced by the censure of the Church, if he admits himself to be under the ban of any of the censures pronounced by the Church. Bingham proceeds, " For the office of " burial belongs only to the *fideles*, or communicants."

Another circumstance materially affecting this part of the subject is, that in the early periods of the Church—even in the Church of England—the holy sacrament was partaken of by those who attended funerals. In Nicholls on the Common Prayer, Additional Notes, p. 65, " Thus it was appointed in King Edward's Service " Book (before Calvin's Letter to the sacrilegious Duke of Somerset got it yielded up), that there should be a celebration of the " sacrament at the burial of the dead." \* \* \* \* " Sure it was the " ancient order of all Christians so to do." \* \* \* \* " In the ancient " Church the communion was at this time celebrated for the same " purpose, to declare by it, that the dead person departed out of " this life in the public faith and unity of the Catholic Church of " Christ." It is perfectly clear that the administration of the communion to persons attending funerals, had reference to the carrying out of this idea,—that the burial service and the burial grounds of the Church were only to be used for the " fideles," and not for any who did not die in full communion with the Church. It is on this ground that burial is refused, in all Roman Catholic countries, to those dying out of the pale of that Church. Protestants, in all Roman Catholic countries, are refused even interment in the consecrated grounds, the services and burial-grounds of the Church being only for the *fideles*. Is it, then, any thing so startling and extravagant, that the Convocation and Parliament in 1662 should

have introduced this rubric, and intended it to apply in the sense for which we contend ? That they should have reasoned thus : "The Protestant Churches think lay baptism void ; the Church of " Rome permits only those dying in communion with her a grave " in consecrated ground ; we will take a middle course ; all but " those excommunicated and suicides shall have a decent grave ; " none but our own *fideles* shall have the service of our Church."

What was the state of things at the time this rubric was adopted ? The Court cannot be ignorant that the parliament was then actually running before the Convocation. The Parliament was only afraid the Act of Uniformity would not be rigorous enough, and threatened to pass it without waiting for the Convocation if the Convocation did not make haste. They were only afraid that heretics and schismatics should have any toleration ; they had fresh and practical experience of what were the real principles of those clamourers for liberty of conscience ; they had seen and felt the effect of those fanatical tyrants having any ascendancy in the Church or the State ; and they determined, well and wisely, however much they may have been mistaken in the means they used, to extinguish, at one blow, the hopes and schemes of these obstinate and formidable enemies.

Let us look at the nature of this Act of Uniformity, the 13th and 14th Charles II. c. 4, " An Act for the Uniformity of Public Prayer, and Administration of the Sacraments," &c. The Court knows that the rubric is part and parcel of this act. Then, with respect to the operation of this act, as expressing the opinion of the Church, to a certain extent, on the question of the validity of lay baptism. This is an act of parliament, it is true ; but it is one of which the Convocation completed a part, and with which the Church thus in a great measure identified herself. The Church and the Parliament went together. One of the objects contemplated by this act was uniformity of public prayer, and uniformity in the administration of the sacraments. [Dr. Harding read the preamble to the act.] The Court sees from the preamble to the act what was its object and purport. It was an act passed *by* churchmen and *for* churchmen, for the purpose of introducing a strict uniformity among all classes of her majesty's subjects ; intended to secure in its own words, sect. 2, " An universal agreement in the public worship of

Almighty God," and to suppress all "factions and schisms" It was not merely framed so that "every person in the realm" might know how the sacraments were to be administered, but also how they could be legally and validly received. Its object was to erect a Church on one uniform model, to make it universal in the country, and to compel every one to conform to it. The words of the 1st, 2nd and 24th sections render this indisputable.

In 2 Phillimore's Reports, p. 269, we find the learned judge, in delivering his decision in the case of Kemp and Wickes, says, "The " rubric, then, or the directions of the Book of Common Prayer, " form a part of the statute law of the land. Now that law in the " rubric forbids the burial service to be used for persons that die " unbaptized. It is not matter of option ; it is not matter of expediency and benevolence (as seems to have been represented in " argument) whether a clergyman shall administer the burial service or shall refuse it; for the rubric, thus confirmed by the " statute, expressly enjoins him not to perform the office in the " specified cases." The rubric is part and parcel of the act of parliament, and is as binding as if it formed a section of that act. The whole of the Common Prayer Book is incorporated in that act. It was an act passed by churchmen ; no one had any concern in passing it but those who were prepared to obey all its provisions. It was an act giving directions to the priests of the Church how to do and perform certain things. It addressed itself in many parts, in the rubrics especially, most peculiarly to the priests of the Church ; and it must have been taken to have addressed itself to persons who were already subject to certain laws, and who had certain authorities to appeal to, but who, nevertheless, might be supposed to put certain constructions upon certain words ; it uses technical words, with the use of which the class of people to whom it addressed itself were familiar. This act points out a certain form for the ministration of the sacraments, and for that of baptism ; and certain passages in it infer very strongly that the office of a minister was essential to the due administration of this sacrament. In the form of ministration of Public Baptism of Infants, after the two questions, " Wilt thou be baptized in this faith ?" and " Wilt thou then obediently keep God's holy will and commandments, and walk in the same all the days of thy life ?" there are four very short prayers or collects, the last of which contains

these words, “Grant that whosoever is *here dedicated to thee by our office and ministry*, may also be endued with heavenly virtues,” clearly inferring the “office and ministry” of the priest to be essential to the dedication of the child to God. We also find, in the same form of service, these passages :—“ Then the priest shall say, “ *We receive this child into the congregation of Christ’s flock;*” “ Seeing “ now, dearly beloved brethren, that this child is regenerate, *and grafted into the body of Christ’s Church;*” again, “ We yield thee “ hearty thanks, most merciful Father, that it hath pleased thee to “ regenerate this infant with thy Holy Spirit, to receive him for “ thine own child by adoption, *and to incorporate him into thy holy Church;*” “ so that finally, *with the residue of thy holy Church*, he “ may be an inheritor of thine everlasting kingdom.” And all these passages, be it remembered, are part and parcel of this act of parliament.

The rubric as to the private baptism of children in houses contains this direction ;

“ But if the child were baptized by any other lawful minister, “ then the minister of the parish, where the child was born “ or christened, shall examine and try whether the child be “ lawfully baptized or no.” \* \* \*

“ And if the minister shall find by the answers of such as “ bring the child, that all things were done as they ought “ to be ; then shall not he christen the child again, but “ shall receive him as one of the flock of true Christian “ people, saying thus :—

“ I certify you that in this case all is well done, and according “ unto due order, concerning the baptizing of this child.”

I apprehend that there are here two methods of proceeding pointed out to the minister, a breach of either of which would render him liable to the penalties imposed by the canons. He is to put the questions ; and, if he finds that all things have been done as they ought to be, he is not to christen the child again, but is to certify that all is well done. If he cannot do this, I apprehend it is clear, from the expressions in the rubric, that he is to baptize the child.—What is the minister to do, supposing he finds that all things were *not* “ done as they ought to be ? ” Can he go on with a safe conscience, and addressing the congregation, say, “ I certify “ you that in this case all is well done, and according unto due

"order, concerning the baptizing of this child?" The Church has, in all times, rejected and denounced the iteration of baptism as a great error. This notion is founded upon the passage—"One "Lord, one faith, one baptism." Now take the child in this case: Supposing she had been brought to the church, what was Mr. Escott to have done? He would have put the questions contained in this rubric; but could he think "all things were done as they "ought to be?"—and could he bring himself to the conclusion that he should not christen the child again? Would he have been justified in saying, "I certify you that in this case all is *well done*, and "according unto *due order*, concerning the baptizing of this child?"—and yet this would be the only state of circumstances which could authorize him "*not to christen the child again.*" But if he *was* to christen the child again, it is clear that the Church considered any thing previously done to be null and void.

At the end of the form for "The Ministration of Private Baptism of Children in Houses," we find this rubric:—

"But if they which bring the infant to the church do make "such uncertain answers to the priest's questions, as that "it cannot appear that the child was baptized with *water*, "in the name of the *Father, and of the Son, and of the Holy Ghost*, (which are essential parts of baptism,) then let "the priest baptize it in the form before appointed for "public baptism of infants; saving that at the dipping "of the child in the font he shall use this form of words: " 'If thou art not already baptized, I baptize thee in the "name of the *Father, and of the Son, and of the Holy Ghost.*' "

This again is to be read as part and parcel of the act of parliament, to be explained and construed by the other rubrics, and its construction is to be aided by all the passages in the prayers (equally parts of the act) which throw any light upon it. Now, supposing the persons bringing a child to be baptized, made answers from which it appeared that the child had been baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, still I do not see how the minister could certify that "*all* was well done, and according unto *due order.*" If it appeared that all had been done that was done in this case for the child of Thomas and Sarah Ann Cliff, the minister would have been bound to administer the sacrament of

baptism. He is to do one of two things,—to baptize the child himself, or to certify to the congregation that *all* had been *well done*, and *according unto due order*, concerning the baptizing of the child. Notwithstanding the baptism might have been performed with water, and in the name of the Father, and of the Son, and of the Holy Ghost — (which, the rubric says, “are the essential parts of “ baptism,”—not the *only* essential parts)—it does not follow that the minister could certify that all things had been well done and according unto due order. It seems to me that the only state of things which excuses a clergyman from performing the ceremony of baptism, is his ability to certify to the congregation that all has been well done. In this case he could not certify it. Unless the questions proposed in the ritual are satisfactorily answered — “By whom was this child baptized? With what matter was this “child baptized?” — unless it appears from the answers to them that all things were “done as they ought to be” — that they were “well done, and according unto due order,” the minister cannot be excused from administering the sacrament of baptism. But, in this case, in answer to the first question the minister would be told — “By a dissenting minister; by one out of the pale of the Church; “ by one who admits he has no authority to baptize.” How, then, could the minister certify that “all was *well done*?”

The service also directs the priest to say,—“We receive this “child into the congregation of Christ’s flock, and do sign him “with the sign of the cross, in token that hereafter he shall not be “ashamed to confess the faith of Christ crucified, and manfully to “fight under his banner, against sin, the world, and the devil; and “to continue Christ’s faithful soldier and servant unto his life’s “end.” The whole of this service seems to imply that a minister is clearly essential to the performance of baptism. The ritual, however, does not direct what the minister is to do in a case which may occur—where he is able to certify that the child was baptized with water, and in the name of the Father, and of the Son, and of the Holy Ghost, and yet where he is not able to certify that all is well done, and according unto due order. I suppose it will be pressed against me, that the proper explanation of “all things “being well done, and according unto due order,” is, that the child was baptize with water, and in the name of the Father, and of the Son, and of the Holy Ghost. I cannot conceive on what

ground, in such a case as this, the priest can certify that "all is well done, *and according unto due order*," when the Church has so expressly discountenanced the ministration of baptism by laymen.

We next come to "The Ministration of Baptism to such as are of Riper Years;" and from it I think we may draw a strong argument in our favour. My learned friend says that this service was framed specially with reference to Anabaptists: I do not see that it was so; I think it probable the Church may have contemplated such cases as have since arisen. In this service we find this passage:—"After which he shall say this exhortation following: "Beloved, ye hear in this Gospel the express words of our Saviour "Christ, that except a man be born of water, and of the Spirit, he "cannot enter into the kingdom of God. Whereby ye may per- "ceive the great necessity of this sacrament *where it may be had*." I think a very important point arises on this observation: I apprehend it means—where you can get it rightly administered. If my learned friends' theory is to prevail, it is to be had anywhere. Two persons existing alone on a desert island—a woman and a child—may have it, for the one can administer it to the other. This passage, let it not be forgotten, forms part of a statute for the purpose of enforcing the due and uniform administration of the sacraments. The service also contains this passage—"Then shall "the priest say, Grant that they, being here dedicated to thee *by* "our office and ministry, may also be endued with heavenly virtues "and everlastingly rewarded," proving that the Church thought the person's being baptized by the office and ministry of the priest to be an important and essential doctrine.

Then, bearing in mind that these passages, to which I have alluded, all occur in the statute, which addresses itself in many points to the priests of the Church, and a compliance with the provisions of which is enforced by severe penalties,—how are the ministers of the Church to construe this particular rubric in the burial office,—"The office ensuing is not to be used for any that die unbaptized?" It is clear from the judgment in Kemp and Wickes, that they would be liable to punishment if they used the burial service over a person who proved to have been *unbaptized*. How; then, in this case, was the minister to consider the child to have been baptized, that is, admitted into the body of Christ's Church, when the baptism was performed by a person who admits himself to be out of the pale of

the Church of England. Looking at the fact that many of these rubries are directed to the priests of the Church, we are compelled to resort to the articles and canons of the Church for an explanation of the terms which they contain. We find, from the thirty-third Article, that persons are out of the pale of the Church who are cut off by "open denunciation" from the Church. The person whom we find in this case assuming to perform the sacrament was just one of these parties; we find the "open denunciation" in the twelfth canon; and yet we are here required to construe the word "unbaptized" as not extending to a child baptized by such a person. I think it would require great ingenuity to get the Court to adopt such a construction. The right way of construing the word "unbaptized" will not, I apprehend, be to give it the sense in which it is used in common parlance, but the meaning consequent upon its connection with the statute. Many cases have been decided by the Courts of Common Law, showing that the sense in which a word is to be taken by a court, when construing an act of parliament, is not its common sense, but one agreeing with the general purport of the act in which it occurs. Thus, for example, in *Martin v. Ford*, 5 T. R. 101, the words "no person or persons," occurring without any qualification in an act of parliament, were construed, "persons employed by the General Post Office," because, as Lord Kenyon said, "the intention of the legislature collected *from the whole context of the act*, seemed to require such a construction:" and in *Gale v. Laurie*, 5 B. & C. 156, the words "ship or vessel," occurring in an act of parliament, were construed, "ship stores and implements used in whaling," because this seemed the purport of other parts of the same act, and of other acts on the same subject.

The word "unbaptized," then, signifies all who die unbaptized, not, I apprehend, in the sense in which the word is used in common parlance, but in its sense with reference to the general purport, requirements and provisions, of this particular act of parliament. I take this to be a clear and indisputable principle of law, and I ask the Court, with confidence, whether, looking to the whole of the act, this child did not "die unbaptized" in the sense of *this particular act of parliament*? I cannot help thinking, that if the act had related to any forms of registration or certificates, and that the word in dispute had been "unregistered" or "un-

certificated," no Court of Law could have entertained any reasonable doubt on the point.

And I would beg to suggest to the Court another difficulty which would attend upon its giving to the word "unbaptized" the sense for which my learned friends insist. The services of the Church were only to be used for, and the burial-grounds of the Church were only to be appropriated to, the *fideles*; and if the word "unbaptized" was not meant to refer to those who have not been *lawfully* baptized, it would never have been inserted in the rubric at all. A person who does not assume to have ever been baptized in any form, can never have been engrafted or admitted into the Church. The intention of the word must have been to guard against the use of the form of Burial Service occurring in the statute for persons who had not been baptized according to the requirements of this statute; it would have been quite needless to forbid the use of this service for those who had never received any form of baptism whatsoever; no minister would ever have thought of using it in such cases.

I shall not attempt to follow my learned friends through the very long string of authorities which they have cited, as to the private opinions of writers who engaged in this controversy. I could, however, quote extracts in favour of our view of the subject from a long succession of writers of as great authority in the Church, at least, from Calvin down to Bishop Mant; but, as Dr. Waterland well remarks, "The Church's public acts are open and "common, and he is the best Church of England man that best "understands the principles there laid down, and argues closest "from them; the rest are but assertions, fancies or practices, of "private men, and are not binding rules to us." And I have given the Court the opinions of foreign Protestant Churches, which, at any rate, are entitled to greater weight than the opinions of any of the individuals to whom allusion has been made. The questions which, it appears to me, the Court will have to decide, are these: In the first place, has the Church of England ever sanctioned lay baptism at all, except in cases of urgent necessity? It is not pretended that this is a case of necessity. Next, can the Church exclude any class of persons from her pale, and has she not excluded this class of persons?—I say that, by the 12th canon, the Church has excluded the Wesleyans—or rather, they have excluded themselves—from her pale. If not, I know not how

persons can be excluded, or what is the meaning of the “open denunciation of the Church,” mentioned in the 33rd article: every person in the country must be within the pale of the Church; and the Church of England will be placed in a situation in which it has never yet been attempted to place any Church, in any age, or in any other country.

Lastly, can my learned friends contend that a person, himself not within the pale of the Church, can admit another person into that Church? and, if the child in this case was never admitted within the pale of the Church, it is clear that it was not the intention of the Church that she should be buried with the services of the Church.

It is surely not a little surprising to find the Wesleyans contesting this question, when Mr. Wesley, their founder, was decidedly against them upon it. He thought his own ministers were not sufficiently ordained, and therefore he distinctly forbade them to administer the sacraments. I apprehend that Mr. Balley follows very closely the opinions of the founder of his sect, for he admits, himself, in express words, “that he has no authority to administer the sacraments;” in other words, that he was here guilty of nothing less than a profanation and mockery of God’s most solemn ordinance. And according to what principle is a person who does not even pretend that he has any authority to minister the sacraments, to be allowed to administer them? Is this Court, speaking with the voice of the Primate of all England, to say to Mr. Balley,—“ You have been under a lamentable mistake. You have supposed “ you had no authority to administer the sacraments. We tell you “ you have. When once you administer the sacrament, whether “ you are out of the pale of the Church or not, you admit the “ person within the pale of the Church. The person you baptize “ is as much baptized as if the ceremony had been performed by “ the Archbishop of Canterbury himself.”

The only question is, whether or not Mr. Escott is compellable by law to read the service of the Church of England over the body of this child? How are we to get at the sense of the Church on this subject? Is it likely that the Church, either by the canons or by the Act of Uniformity,—no Dissenters then having legal existence,—meant to compel clergymen of the Church of England to read the services of the Church over the remains of those who

were not admitted within her pale? Does the Church consider a person baptized under such circumstances as the child in this case baptized by Mr. Balley, to be lawfully admitted within her pale? And if not, how can Mr. Escott be compelled to read the service over it?

I beg to apologise to the Court for the long period during which I have occupied its attention. This is a criminal suit, and I claim for my client the benefit of any reasonable doubt which the Court may entertain on any part of the case which it considers essential to its determination. Many of the arguments I have advanced may not appear to be entitled to much weight; many of the arguments which my learned friends have used, I do not think the Court will consider entitled to much greater. We have been obliged, in the discharge of our duty, to suggest every thing which we thought might possibly influence the decision of the Court; or lay in the mind of the Court the foundation of any reasonable doubt on the question, which might be favourable to our client. I hope the decision which the Court may pronounce will be satisfactory not merely to lawyers, and to laymen, but to all the members of that great and venerable body, on behalf of one of whom we appear here,—a body, the first in point of education, the first in point of influence in this country, the first in the heartfelt attachment and sincere respect of the great mass of their fellow-subjects,—a body claiming not merely human authority, and showing by its general conduct and demeanour that it is not unworthy to bear the Divine commission; I mean the bishops, priests and deacons, of the united Church of England and Ireland; the conscientious scruples of any one of whom are surely entitled to receive, and I feel confident will receive, at the hands of this Court, the most patient and favourable consideration.

The *Queen's Advocate*.—It is now my duty to offer some observations in reply to the arguments of my learned friends. I quite agree with them in thinking that this is a question which ought to be calmly and dispassionately considered; that it is not a case in which we ought to array the opinions of one body of Christians against those of another, or to stir up strife between different branches of the Christian community. I agree, too, in the sentiment uttered by the learned counsel who last addressed the Court, that great respect is due to that very learned body to which he has

alluded ; and I trust that nothing which has fallen from me, or from my learned friends with whom I have the honour of being associated, can be considered as throwing any imputation upon that body, or as doing more than fairly to represent the interest which it is our duty to support. This question is, as has been truly stated, one of considerable importance,—of the highest importance, indeed, I may say, to the parties for whom I appear, and to those connected with them, because if the decision of the Court should be in favour of the defendant, the effect of that decision will be to deprive of the right of Christian burial a very large portion of her majesty's subjects ; whereas, if the decision be the other way, the consequences will be far less injurious to the opposing parties. Indeed I am at a loss to know what possible injury can be inflicted upon the Church of England, or how her ministers can suffer in their character, reputation, or feelings, from performing the burial service over the bodies of their fellow-Christians,—of persons who have been admitted into the holy Catholic Church, although not into that particular branch of it known as the Church of England.

My learned friends, in arguing this case, felt the weight that is due to the judgment delivered by your predecessor on the bench, in the case of Kemp and Wickes. But they have endeavoured to show that that case is completely and entirely distinct from the present. That case, they say, involved the question of *lay* baptism only ; whereas the present case is one of *schismatic* baptism, and that baptisms by *schismatics* have at all times been held null and void ; and they challenge us to point out any case or authority in the Church, wherein baptisms by *schismatics*, whether *lay* or *clerical*, have been allowed as good and valid. I apprehend that the blow which my learned friends have here attempted to strike must recoil upon themselves, and that it would be the greatest misfortune that could be inflicted on the Church of England, should they be successful in this argument. If all baptism by *schismatics* is to be held null and void, that position, I say, would tend to destroy the Christianity of the Church of England herself. Where does the authority of the Church of England come from ? Whence does she derive it ? From the Church of Rome, which, in my humble judgment is to be deemed both a *schismatical* and *heretical* Church.

Dr. *Phillimore*.—She derives it from the Apostles.

The *Queen's Advocate*.—*Through* the Church of Rome.

Dr. *Phillimore*.—*Through*, but not *from*.

The *Queen's Advocate*.—It is conveyed to the members of the Church of England through the Church of Rome. The reformers by whom the Church of England was established were baptized by Roman schismatics ; and yet my learned friend says there never was an instance of schismatical baptism being deemed a valid baptism. I say that this position, if it could be maintained, would go far to unchristianize the Church of England ; for it cannot be denied that her baptism, her orders, everything she has, was derived through the Church of Rome. If this baptism is insufficient, I apprehend that my learned friend has proved a good deal too much for his case. But I think I shall be able to satisfy the Court that baptism by schismatics and heretics, as well as by laymen, has been deemed good.

What my learned friends mean by schismatics, I apprehend, is this, viz. that schismatics are those who have not yet quitted the Church, but who hold opinions on the point of discipline not sanctioned by the Church ; whereas heretics are those who entertain doctrines inconsistent with the faith of the Church. This, I presume, is the distinction they mean to draw between schismatics and heretics.

It has been said that no instances can be found of *schismatic* baptism having been allowed as valid by the Church ; but it so happens that this question arose in the Church at a very early period,—almost as soon as the question of *lay* baptism. About the beginning of the fourth century great discussions took place on the subject, and the Church then came to the conclusion that the baptism of all schismatics was good, if done in the name of the Father, and of the Son, and of the Holy Ghost, and with water ; and that the baptism of heretics was good also, if done with water, and in the name of the Father, and of the Son, and of the Holy Ghost, i. e. in the name of the Holy Trinity, and not in the sense intended by the Arians, who use the same words, but with a different meaning,—for, although they baptize in the name of the Father, and of the Son, and of the Holy Ghost, yet as they consider the Father to be the *Creator*, and the other two persons of the Holy Trinity to be *created beings*, the Church does not allow their baptism to be good. The doctrine maintained by the Church at that early period was, that baptism, whether performed by heretics or by schismatics, was good, if administered with water, and in the

name of the Father, and of the Son, and of the Holy Ghost ; and although the parties performing the sacrament might not use these words in the right sense, that still it was a legal and valid baptism. Upon this point I beg to refer the Court to the authority of Bingham.

Dr. *Phillimore*.—I read the passage to the Court myself.

The *Queen's Advocate*.—If my learned friend read it, and admits it, he has put himself out of Court.

Dr. *Phillimore*.—My learned friend mistakes me. My argument was, that a clergyman of the Church of England never had been compelled to bury a child, which, under the canons, had been baptized in schism.

The *Queen's Advocate*.—In Bingham's “ Scholastic History of Lay Baptism,” part i. ch. i. s. 20, he says, “ That the true state of “ the matter in the fourth century was this, the baptism of schis-“ matics was generally received as valid without any distinction ; “ and the baptism of such heretics as did not baptize in the name “ of the Trinity, and in the form of the Church, was as generally “ rejected ; but about the baptism of those who gave baptism in “ the name of the Trinity, and yet did not believe the true faith of “ the Trinity, as the Arians and some such others, there was still “ some question remaining.”

He then mentions several councils—that of Arles, in the year 314, and that of Nice, where this doctrine was maintained. A contrary doctrine, he says, prevailed in the African Church.

As to the Wesleyan Methodists, no human being can doubt that their faith is orthodox as to the Father, the Son, and the Holy Ghost. They depart as far from the Arians as the Church itself does ; in fact, they hold precisely the same doctrines as are held by the Church. So that, wherever there is the invocation of the Trinity, and the use of water, the baptism is held to be good.

In his Epistle Dedicatory to the Bishop of Winchester, prefixed to the second part of this work, Bingham says : “ The result, then, “ of the whole enquiry is this, that the Catholic Church was so far “ abetting or encouraging the priesthood of heretics and schis-“ matics, that she vacated and destroyed their commission, and re-“ duced them by her discipline, to the state of laymen : but yet “ she did not wholly cancel and disannul the unauthorized baptisms “ of those uncommissioned laymen or priests who had lost their

" commission ; but only supplied what was irregular, unauthorized " and deficient, by her own just authority and power in a subsequent confirmation. And it is well known that the practice of " the Church of England, for these two hundred years, has been " the very same." So that the Church reduced priests who were schismatics, or heretics, to the state of *mere laymen* :—she had commissioned them to preach the word of God, and to administer the sacraments, but when they were guilty of heresy or schism, she expelled them, and deprived them of that authority she had before conferred upon them. It is put in as strong terms as it can be worded in ; she reduced them to the state of "uncommissioned " laymen, or priests who have lost their commission."

Dr. *Phillimore*.—You cannot say the Wesleyan minister in this case has lost his commission.

The *Queen's Advocate*.—Take him as a *layman*,—an *uncommissioned layman*. Can you put the case lower than this ? My learned friends have dwelt much upon the statement of Mr. Balley that he was not authorized by Mr. Wesley, or by the Conference, to administer baptism. Taking this in its fullest sense—(and the interrogatory was not sufficiently explained to him)—the utmost it comes to is, that he is an uncommissioned layman. I think, then, there is an end of the discovery which my learned friends have made, that this case differs in any essential particular from that of Kemp and Wickes. My learned friend says, in effect, " I grant, " that this baptism would have been good, if the person who administered it had been a *lay dissenter* ; but this Mr. Balley has not "departed from the Church ; he is not a *dissenter* but a *schismatic*." What an argument is this ? If Mr. Balley had dissented from the Church of England,—not only from its discipline, but also from its doctrine,—then he might have administered the sacrament of baptism ; but inasmuch as he does not dissent from her doctrine—from her faith, but merely approves a different system of discipline, baptism administered by him is utterly null and void. So that, the wider his dissent from the Church, the greater the power to be given to a person to perform the sacrament of baptism.

Then it has been said that, in this case, the clergyman could not possibly perform the rites of burial, without a breach of his ordination vow ; that, looking at his ordination vow, and the Articles of the Church, particularly the twenty-third Article, he

could not be expected to perform—and the Church could not mean that he should perform—the office of burial over this child. What says the twenty-third Article ?

“ It is not lawful for any man to take upon him the office of  
 “ public preaching, or ministering the sacraments in the  
 “ congregation, before he be lawfully called and sent to  
 “ execute the same. And those we ought to judge law-  
 “ fully called and sent, which be chosen and called to this  
 “ work by men who have public authority given unto  
 “ them in the congregation, to call and send ministers  
 “ into the Lord’s vineyard.”

Now Mr. Balley does not pretend, in this case, to have this authority ; he admits that he is not a lawful minister within the meaning of the Church of England. My learned friends say, that no minister of the Church of England can bury any child, if such child has not been baptized by a minister of the Church of England, according to the requirement of this canon. But how is this consistent with another part of the argument of my learned friends ? What is the date of this Article ? 1562. And yet it is part of my learned friends’ own case—it is set forth in their plea—that down to 1603 the Church of England tolerated lay baptism. This is part of their own case ; and therefore cannot be denied by them. This admission, as it appears to me, does away with the whole of their argument attempted to be derived from the twenty-third Article. If a clergyman cannot now conscientiously bury a person who has not been baptized by a lawful minister of the Church of England, how could he conscientiously do it between 1562 and 1603 ?

But another objection urged by my learned friends arises out of the Ordination Service,—especially the preface to that service. The service is entitled, “ The Form and Manner of making, or—“ daining and consecrating of Bishops, Priests and Deacons, “ according to the order of the United Church of England and “ Ireland,” but this does not infer that there may not be bishops, priests and deacons in other Churches, or in other branches of the Catholic Church. The preface begins: “ It is evident unto all “ men diligently reading the Holy Scripture, and ancient authors, “ that from the Apostles’ time there have been these orders of “ ministers in Christ’s Church ; bishops, priests, and deacons.

" Which offices were evermore had in such reverend estimation, " that no man might presume to execute any of them, except he " were first called, tried, examined, and known to have such qua- " lities as are requisite for the same ; and also by publick prayer, " with imposition of hands, were approved and admitted thereunto " by lawful authority. And therefore to the intent that these " orders may be continued, and reverently used and esteemed, in " the United Church of England and Ireland ; no man shall be " accounted or taken to be a lawful bishop, priest, or deacon, in the " United Church of England and Ireland, or suffered to execute " any of the said functions,"—(that is, any of the said offices, for the functions to be performed by bishops, priests, or deacons, are not enumerated ; the true meaning, I apprehend, is, to assume the *status* of bishop, priest, or deacon)—" except he be called, tried, " examined, and admitted thereunto, according to the form here- " after following, or hath had formerly episcopal consecration or " ordination." The twenty-third Article seems to me to be couched in quite as strong terms as this preface to the Ordination Service. This preface is merely as to the form and manner of making, ordaining and consecrating bishops, priests, and deacons, according to the order of the United Church of England and Ireland ; and does not assert, either directly or by necessary implication, that baptism administered by other persons may not be a valid baptism.

My learned friend who last addressed the Court has referred to the opinion of foreign Protestant Churches on this subject ; and I am free to admit, that, with regard to the French Church, it is clear it held a doctrine opposite to that of the Church of England on this point. Correspondence has taken place between learned divines in the two Churches on the subject ; and it is clear that in the French Protestant Church baptism was not allowed by any persons but those who were properly appointed. But, according to the argument of my learned friends opposite, neither the French Church nor the Scotch Church can validly baptize ; since the ministers of those Churches are not episcopally ordained, and no man, it is said, can be a regular priest, or deacon, except by episcopal ordination.

*Dr. Phillimore.*—In the Church of England.

*The Queen's Advocate.*—I agree with you. But I consider the

Churches before mentioned as branches of the universal Church of Christ. I consider the Scotch Church to be so, although she has not a minister episcopally ordained; and she has been recognized as a branch of the Catholic Church by acts of our parliament. I find also that the Church of Geneva, which is equally without episcopal ordination, has been treated by the highest authorities of the Church of England as a branch of the Catholic Church. The question is, what was the opinion of the ancient Church, and what has been the doctrine of the Church of England on the point; and I think the authorities we have cited are too powerful for my learned friends to refute.

**Sir HERBERT JENNER.**—The Scotch Church is acknowledged as a branch of the Catholic Church, in an act of the last session of parliament.

**The Queen's Advocate.**—If it is necessary, in order to a valid administration of the sacraments, that there should be episcopacy in a Church, there is scarcely such a Church to be found. There is, I believe, on the continent of Europe, scarcely a Protestant Church in which they have, or profess to have, bishops, deriving their authority in direct succession from the Apostles. The argument that no one shall baptize but persons episcopally ordained, would virtually destroy the validity of all baptisms in the Protestant French and German Churches.

My learned friends have been constrained to admit, that the words "lawful minister," in the rubric of the baptismal service, mean "lawful minister of the Church of England;" and they now contend that nobody is entitled to burial by the Church of England, who has not been baptized in the Church of England. If this argument is admitted, those consequences which I before pointed out to the Court will result. All the foreigners in this country will be excluded from Christian burial,—members of the Church of Rome, as well as others. At first, my learned friend wished to include persons who had been baptized in the Church of Rome, because the ministers of that Church are episcopally ordained; but now he says that those persons only are entitled to burial in the churchyards of the Church of England, who have been baptized by ministers of the Church of England.

**Dr. Harding.**—I admitted that they are entitled, at common law, to burial in the churchyards.

Sir HERBERT JENNER.—You argued, however, that, from the earliest times, interment in the churchyards was confined to the *fideles*, or communicants.

Dr. *Phillimore*.—This child had Christian burial.

The *Queen's Advocate*.—Then this child has been admitted into the Church of Christ. My learned friend admits that she has been baptized into the Church of Christ, though not into one particular branch of it. I think we are now making some progress.

Sir HERBERT JENNER.—Does Dr. *Phillimore* admit that?

Dr. *Phillimore*.—No ; no.

The *Queen's Advocate*.—It should seem, then, that the admission just made by my learned friend was a mere slip, and that he now falls back to the position that the child was not baptized at all,—that she was not a member of Christ's Church. This, indeed, is the main point which the Court has to decide ; and I trust that the arguments we have submitted to the Court on this point have been satisfactory.

Then, with regard to the right of all Christians to be buried in the churchyard, and to have the service read over their remains. My learned friends say it is true they may be entitled to be buried—to have their bodies deposited—in the churchyards of the parishes in which they die ; but not to have the burial service performed over them by a minister of the Church of England ; and if not by him, I apprehend by nobody ; for no one can have the right to read the service over a body in a parish churchyard except a lawful minister of the Church, and any other person intruding for that purpose into the churchyard would be guilty of an infringement of ecclesiastical law. On what ground, then, is it that a person may have his body interred in the churchyard, and yet may not have the service read over his remains ? My learned friends have referred to a case, *Rex v. Taylor*, the Daventry case ; and they have expressed a regret that there is no good report to be found of that case. Copies of the affidavits used in the case have, however, been procured, and are now in Court. It was an application to the Court of Queen's Bench against the clergyman, for a *mandamus* to compel him to bury the body of a person dying within his parish.

Dr. *Nicholl*.—It was originally stated, on the application for the rule, that the clergyman had refused to allow the body to be taken into the churchyard,—that the gates were locked, and that the body

was not allowed to be taken in. On showing cause, affidavits were produced that the clergyman had allowed the body to be taken into the churchyard, and had permitted a grave to be dug there ; but he swore positively that he did not believe the person to have been baptized. The rule was discharged, the Court holding that they could only order the interment of the body, the performance of ecclesiastical rites being left to the ordinary.

The *Queen's Advocate*.—Another reason advanced by my learned friends, why this baptism is not good, is that Mr. Balley is, on his own evidence, to be considered excommunicate under the twelfth canon. That canon is—

“ Whosoever shall hereafter affirm, that it is lawful for any  
“ sort of ministers and lay persons, or of either of them,  
“ to join together, and make rules, orders, or constitutions,  
“ in causes ecclesiastical, without the king's authority, and  
“ shall submit themselves to be ruled and governed by  
“ them ; let them be excommunicated *ipso facto*, and not  
“ be restored until they repent, and publicly revoke those  
“ their wicked and anabaptistical errors.”

Then, say my learned friends, Mr. Balley has answered to an interrogatory that he does consider it lawful for ministers and lay persons to join together, and make rules, orders, or constitutions, in causes ecclesiastical. This, however, was no voluntary declaration on his part, but was extracted from him by an interrogatory artfully framed for the purpose. It was no voluntary and well-considered declaration ; but, when a leading question was suddenly put to him, he made this reply, not, perhaps, very carefully considering the question. What is it that the canon denounces ? The joining together, and making rules, orders, or constitutions, in causes ecclesiastical, without the king's authority, and submitting to be ruled and governed by them. What is the meaning of the terms “orders or constitutions in causes ecclesiastical ?” Did Mr. Balley fully understand their meaning ? I apprehend not ; and I observe that the answer of another witness, who is a minister of greater experience, and of longer standing than Mr. Balley, gives a very different version of the doctrine held by the Wesleyans as to the lawfulness of making rules, orders, or constitutions, in causes ecclesiastical, without the king's authority. It is also to be observed that the words of the canon are, “ *Let them be excommunicated*,”

not that they *are* excommunicated, but implying that they are to be *denounced* excommunicated.

Sir HERBERT JENNER.—What is the meaning of the term “*denounced*?”

The *Queen's Advocate*.—Denounced by an ecclesiastical judge.

Sir HERBERT JENNER.—Is that the only meaning of the term? Are there not two forms of sentence, *per judicationem*, and *per denunciationem*?

The *Queen's Advocate*.—It appears so in Oughton. There must be a denunciation or pronouncing of a sentence of excommunication.

My learned friends have said a good deal about the mode of proceeding in this case; they think we are very unjust in our reflections upon them, and that we have given them a very unnecessary piece of advice in recommending them to pursue the course taken in the case of Kemp and Wickes. They seem to think that they have acted much more judiciously than the counsel who conducted that case in 1809. I think, however, my learned friends are mistaken in this. I think they ought to have raised the question upon the admission of the articles given in against Mr. Escott. Now what is the necessary consequence of the course they have pursued? The case comes on for hearing upon evidence, and the Court, if it holds the case proven against Mr. Escott, is driven to the necessity of pronouncing the sentence required by the canon—of suspending Mr. Escott for three months; whereas, if they had taken the course pursued on the former occasion, the Court would have decided the point of law upon the admission of the articles, and it might have contented itself by directing the articles to be admitted, without inflicting punishment.

Sir HERBERT JENNER.—What was the mode of proceeding in the former case?

The *Queen's Advocate*.—The Court admitted the articles; and I believe that an affirmative issue was then given;\* and that the Court afterwards condemned the defendant in costs, but without imposing other punishment.

The *Queen's Advocate*.—It has been said that a clergyman of the Church of England must feel a difficulty in using the terms contained in the service for the burial of the dead over per-

\* It was subsequently stated by the registrar that an affirmative issue had been given.

sons who have not been baptized by a minister of that Church. They seem to think that a clergyman may have great and conscientious scruples in using such parts of the service as these :—“ Our “ dear brother here departed,”—“ This our sister.” Now, assuming that this child had been admitted into the Catholic Church of Christ,—though not into a particular branch of it, the Church of England,—I am at a loss to know why any clergyman should scruple to make use of these terms,—why he should hesitate to designate any departed Christian, a member of any branch of Christ’s Church, “ our dear brother,” or “ our dear sister.” Neither do I see why he should object to use the words, “ In sure and certain hope “ of the resurrection to eternal life.” No objection whatever is made, or can legally be made, by any clergyman to perform the funeral service of the Church on the occasion of the interment of the corpse of any person, of whatever crimes he may have been guilty, provided he has been baptized by a minister of the Church of England. A person may even have suffered on the scaffold for heinous offences, and be taken from thence for burial, and yet the service may and must be performed over him by a minister of the Church of England. If, then, the burial service is applicable to a person so circumstanced, why should there be any scruple at reading the Church service over the body of an infant, provided such infant had been admitted into any branch of Christ’s Church? Again, in the Collect in the Burial Service these words occur : “that, when we shall de- “ part this life, we may rest in him, as our hope is this our brother “ doth.” Who can be scrupulous at expressing a hope regarding any one admitted into the Christian Church, that at the general Resurrection in the last day, he may be found acceptable in the sight of God? It appears to me that no possible violence can be done to the conscience of any clergyman of the Church of England by his being required to perform this service over the body of a child who has been baptized, and admitted a member of the Christian Church, although the ceremony may have been performed by a minister of the Wesleyan persuasion.

It has been asked, “ If the defendants refuse to join us “ in our communion while they live, why should they call upon “ us to perform Christian burial over them after their death?” “ Why,” says my learned friend, “ do they claim burial of this “ child from us? Why not take the body to Wisbeach, and bury

“ it there, with other Dissenters ?” The obvious answer is, that by the removal of the body to such a distance, very great inconvenience and expense would be incurred by the parents, who are poor people. That they very naturally and properly wish that its remains should be deposited as nearly as possible in the same spot as those of other friends and relations who may have been heretofore buried in the churchyard of Gedney, their native parish. The parents are very poor persons ; even the loss of a day’s labour would be of serious importance to them ; and why should they be required to take the body from their own parish to the town of Wisbeach, a distance of at least twelve miles ? It should also be borne in mind that, in many parts of the country, the Dissenters have no burial places of their own within distances much greater than that of the parish of Gedney from Wisbeach. Neither should it be forgotten, that the authorities of the Church require payment of rates from all parishioners, whether they belong to that Church, or whether they are dissenters from it ; and that these rates are applied, not merely to the reparation of the fabric of the church, but to keeping in proper defence and order the very churchyards in which my learned friends say the bodies of the “ *fideles*” only are to be deposited with the performance of the Burial Service.

The great point in this case is, however, whether this child is, within the true meaning of the rubric, to be considered *wholly unbaptized or not*. I submit that, upon a consideration of the history of the law, and the practice of the Church of England, there can be no doubt that the former decision of this Court in the case of Kemp and Wickes was a just and proper decision ; that the distinction, which my learned friends have endeavoured to draw between a schismatical and a lay baptism, cannot be maintained ; that the word “ unbaptized ” in the rubric is not properly applicable to this child, who was baptized with water in the name of the Father, the Son, and the Holy Ghost ; that Mr. Escott was therefore not justified in refusing to perform the funeral service, and that he ought to be canonically punished for his offence.

**Dr. Haggard.**—It has been pressed, in the first instance, that we are bound strictly to prove the articles *modo et formā* ; but I apprehend the question is, whether we have succeeded in proving the refusal of the defendant to bury the infant, convenient warning having been given to him that the body would be brought to the

churchyard for interment. In following the precedent of *Kemp v. Wickes*, we set forth in the articles that the individual who performed the rite of baptism for this child was a minister of a particular persuasion, and qualified to perform the rite ; and the course of argument adopted on the other side, leads me to advert to the evidence taken upon the articles ; for my learned friends have argued, that the circumstance of Mr. Balley, the minister, having administered the Sacrament of Baptism, is a recantation of his connexion with the Wesleyans, as contrary to the opinions of the Wesleyan community, and directly at variance with the tenets of Mr. Wesley himself ; but if the last article of the defensive allegation had been admitted, it would have led to a responsive allegation, showing the changes made by the authorized Conferences of the body of which Mr. Wesley was the founder ; and it would have been proved indisputably, that Mr. Wesley, towards the close of his life, relaxed from that principle which influenced him in early life, and that he did not hesitate himself to impart the sacraments,—and by his authority, advice, and sanction, he also communicated that power to some of his followers. Nay, more, at the close of his life, he did not hesitate to ordain ministers, according, as he says, to the form of the Presbyterian Church, and to send forth those ministers to officiate, not indeed in this country, but in our colonies. These ministers administered both the Sacrament of Baptism and the Sacrament of the Holy Communion. It is true that Mr. Balley and Mr. Bond are, in their evidence, somewhat at variance as respects the competency of the former to administer baptism : but if we are called upon to say which of the two opinions is the most accurate, we must take that of Mr. Bond, who, in point of seniority and experience, is the best qualified to form a correct judgment upon the subject. He states, on the 6th interrogatory, that “ Mr. Balley is “ a regular travelling preacher in our connexion ;” and, on the 10th, in reference to the question put to him, whether he admits the authority of a portion of Mr. Wesley’s sermons, he says, “ My reason “ for denying it to be so applicable is, that the Conferences already “ stated have since allowed the Sacrament of Baptism to be per-“ formed by probationary ministers in cases of emergency and ne-“ cessity.” And the child, in this case, though we do not depend upon the point, was in a dangerous state when the rite of baptism was performed. Nor do I place the least reliance, in arguing this

case, upon the fact that the rite was imparted by a Wesleyan minister : I rely upon the broad position, that baptism once imparted, by whomsoever the rite is performed, with water, and the invocation of the Father, and of the Son, and of the Holy Ghost, entitles the recipient to have the rites of Christian burial performed by a minister of the Church of England ; that a person so baptized does not come within the exception of the rubric in the Burial Service. The whole question turns upon the meaning of the word "unbaptized"—as to the sense the Church and the law have affixed to it ; and I again claim the authority and force of the only judicial exposition I find of that word, given in the elaborate judgment of Sir John Nicholl in Kemp and Wickes. That exposition gives the meaning of the word in common parlance, and the sense in which it is to be taken in the rubric.

It was suggested, that the promoter of this suit had no *persona standi* in Court. But, where is the evidence to show that the promoter is excommunicated ? Is a party to be deprived of rights inherent in him as a subject of this realm, upon the mere casual *dicta* of witnesses upon cross-examination ? Is he to be deprived of these rights without being heard himself,—without an express averment of the fact that he has been denounced excommunicate : and some weight must be given to the word "*denounced*." I will again cite the authority of Kemp and Wickes as to the term "ex-communicated." Sir John Nicholl says, "What is meant by the "Church of England by the term of excommunication, can be best "explained by the Articles of that Church. By the thirty-third "Article it is expressly stated, 'That person which by open denun- "ciation of the Church is rightly cut off from the unity of the "Church and excommunicated, ought to be taken of the whole "multitude of the faithful as an heathen and publican, until he be "openly reconciled by penance, and received into the Church by a "judge that hath authority thereunto.' " Then before the promoter of this suit can be regarded as so denounced, we must have something more than the casual answers to the interrogatories. In reference to parties denounced excommunicate, where it was obvious that they were out of the communion of the Church, both before and since the Reformation, there have been instances when the bishop has been satisfied of their repentance, of commissions granted to bury such persons, they having died without an opportunity of

being reconciled to the Church in the open and public manner in which reconciliation is to be regularly and ordinarily performed in the case of excommunicated persons. If the person, by reason of his heretical doctrines and schismatical errors, is *ipso facto*, and without any form whatever, put out of the pale of the Church, how is the Church to reach him, and put him still further out of her pale, by excommunication? In regard to this matter, I will refer to the language of the 4th section of the Toleration Act, which enacts, "that all persons that shall take the said oaths, and make " and subscribe the declaration aforesaid, shall not be liable to any " pains, penalties, or forfeitures mentioned in an act made in 35th " year of the reign of the late Queen Elizabeth (35 *Eliz. c. 1*), nor in " an act made in the 22nd year of the reign of the late King Charles " the Second (22 *Car. 2, c. 1*), nor shall any of the said persons be " prosecuted in any Ecclesiastical Court, for or by reason of their " non-conforming to the Church of England." The statute law of the land, as it seems to me, puts an end to non-conformity being an offence according to the law of the land, or punishable in the Ecclesiastical Courts.

Sir HERBERT JENNER.—What is the meaning of the words "join together, and make rules, orders, or constitutions, in causes ecclesiastical," in the twelfth canon?

Dr. *Phillimore*.—I apprehend the expression had reference to the Puritans, who, at that time, were holding meetings.

Dr. *Nicholl*.—In Fuller's Church History, vol. iii., page 105, the Court will find some articles objected against one Cartwright, from which it will see what is the meaning of persons meeting together, and making rules in causes ecclesiastical. "21. *Item.* Since his placing at Warwick, he, with others, at such times as they thought fit, have agreed to have, and so have had, divers public fasts without the Queen's authority, and have invited and persuaded both sundry persons to be there present, and also certain to preach, to the number of three, four or five successively, one after another; being all noted to be such as mislike and impugn sundry points of the laws, government, and liturgy ecclesiastical of this Church of England. In which sermons, both he the said Cartwright, and such others also as then preached, did impugn and inveigh against the present laws, government, polity, and liturgy ecclesiastical of this Church of England." Other articles

state that he had organized synods in various parts of the kingdom, and that at these synods and other meetings the parties present agreed, *inter alia*, that no obedience should be given to bishops, or such other ecclesiastical officers as are now used in the Church of England.

**Dr. Haggard.**—Whatever censures Non-conformists might subject themselves to by their irregularities, it does not appear to me that they were brought within the language of the canon—that they were denounced excommunicated: and I am not aware of any less formal mode of pronouncing a heretic or schismatic excommunicate than *in foro contentioso*. I apprehend the Toleration Acts put the condition of those to whom they refer in the same state in which they were before they were placed under any legal disabilities; and it is only on this principle that I can understand the cases alluded to by Dr. Harding, as to Non-conformists being entitled to invoke the aid of Courts of Equity, in order to give effect to their endowments and institutions; that also being the principle on which it has been considered that Non-conformity is not only innocent, but lawful; and that Non-conformists are not subject to any disqualifications beyond others of her Majesty's subjects.

Some allusion was made to the opinions of the ancient Church on baptism by schismatics and heretics, as well as to the general principle of the invalidity of lay baptism. I should have thought that the passage quoted by Dr. Nicholl from the Life of Cyprian, would have been sufficient to meet the objections of my learned friends on this point; but I would refer also to Ayliff, an authority well known in this Court, who points out the view that the primitive Church took of baptism by schismatics, and the authority of Calvin on the subject is given.\* Lyndwood says, also, that baptism administered by a heretic or schismatic is valid.

Reference has also been made to the Conferences of 1603, and to the opinion of Archbishop Whitgift, expressed in his discussions with James the First. The reporters of that Conference state, that “Archbishop Whitgift proceeded to speak of private baptism, “showing that the administration of baptism by women and laics “was not allowed in the Church, but inquired of by the bishops “in their visitations, and censured.” We admit that lay baptism

\* *Vide supra*, p. 57.

was to be discouraged : but the question is whether it was valid, or whether it was to be set aside as nugatory. Our argument is, that be it regular or irregular, yet when once performed with the two essentials—water and the invocation of the Holy Trinity—then it is good for all purposes, and entitles an infant to Christian burial. My object in adverting to Archbishop Whitgift is to show what, in fact, his opinion was ; and in the 7th volume of the “Quarterly Review,” p. 214, in a review of two publications growing out of the judgment in Kemp and Wickes, I find that archbishop’s opinion as to what are the essentials of baptism—not reported by others, but expressed in his own words. “So far as I can read, the “opinion of all learned men is, that the essential form, and as it “were the life of baptism, is to baptize in the name of the Father, “of the Son, and of the Holy Ghost, which form being observed, “the sacrament remaineth in full force and strength, of whom “soever it be ministered.” And again, a little further on, we read, “Baptism ministered by heretical ministers, which be no members “of the Church, is notwithstanding good and effectual.”

My learned friend Dr. Harding drew a parallel between the weight due to the Article of the Conference of 1575, and that of 1712 ; and he claimed, I think, for the Article of 1575, as much, if not more, force, than we claim for the proceedings of the Conference in 1712. He admitted that the Convocation of 1575 was a single Provincial Convocation, and that the province of York was not implicated or bound up in it : and it has not been shown from any authority, that the Article was circulated otherwise than in manuscript. In reference to the Conference of Lambeth in 1712, at which the two archbishops and a majority of the bishops of both provinces were present, it is stated by Burnet that Archbishop Sharpe retracted his opinion ; but I find, from the Life of Archbishop Sharpe, drawn from his own memoranda, that although he thought that baptism by all other persons except lawful ministers ought, as much as might be, to be discouraged ; yet that, as to those who were baptized by other persons, if the essentials of baptism were observed, such baptism was valid, and ought not to be repeated : and in those respects his opinion remained unchanged. When, however, the Archbishop of Canterbury proposed a public announcement of the sentiments of the archbishops and bishops, to

this purport, Archbishop Sharpe, doubting the propriety of such a step, withheld his name from sanctioning that, which he thought would have a tendency to encourage dissent. We must look, I think, to this more authentic record, to ascertain Archbishop Sharpe's views.

It has been argued that the sixty-eighth canon only applies to members of the Church of England; but the 3rd of James I., by which the executors of deceased Papists were obliged to bring their remains to be buried in the churchyards of the parishes in which they died, directs that their burial was to be according to the laws ecclesiastical of this realm, and consequently inferred that these Papists, not being excommunicate, were to be buried with the rites of burial of the Church of England. The canon, therefore, does not refer solely to those who were members of the Church of England; for Papists cannot be contended to have been members of that Church. The statute plainly imposes upon parish priests the duty of interring, with the funeral rites of the Church, the bodies of Papists who did not die excommunicate. At the date of that statute there was only one class of persons to whom the rites of burial, according to the service of the Church, could be legally refused, and that was to persons who died denounced excommunicate; and in order to remove that disability, it was necessary to apply to the bishop for a commission to bury, as if the party had died in communion with the Church. But it is clear the infant in this case could not come within that exception.

With reference to the right of burial, several cases at Common Law have been referred to: those of *Andrews v. Cawthorne*, and *the King v. Taylor*. The Court has heard portions of the affidavits in the case of *Taylor*; and it has heard, also, the opinion of the Court of Queen's Bench, in the much more recent case of *the King v. Coleridge*, which shows that an application to the Courts of Common Law must be limited to the right of sepulture, because, though those courts can give a parishioner a right of burial in the churchyard, the mode of performing the ceremony is decided by the Ecclesiastical Court. We therefore come back to this question: —What is, according to the view of the Church, as expounded by its authorized expositor, the Ecclesiastical Court, the true meaning

of the word “unbaptized?” The authorities which have been referred to prove, I think incontestably, that, whether lay baptism were more or less regular before the Reformation than it has been since, yet that from the earliest period, down to the present day, it has been recognized as valid. At least, it has been made valid to the extent that it could by no means be reiterated. If it is once admitted that lay baptism can be valid, it must be valid in any case; for no necessity, however urgent, can impart to the rite a validity which, of itself, it cannot claim. If it is valid in one case, it must be in the other; and the rite being once administered *modo et forma*, as pointed out by the Church, remains valid, whether performed in a case of necessity or not. Was the baptism in this case, then, not valid, so as to entitle the child to burial at the hands of the minister of the parish in which she died?

With regard to the Act of Uniformity, to which repeated allusion has been made, it was an act made and passed with a view, so far as human infirmity will allow, and so far as human laws can enforce it, to obtain an uniform system throughout the Church, and to maintain it in unity and peace. The authority of the Scotch and French Churches have been referred to. I would, however, rather appeal to the authority of the Church of England. I would rather refer to the authority of Archbishop Laud, than to the Confession of Faith put forth by the Church of Scotland: but it is not upon the opinion of controversialists that we intend to try this question, or I would take up Bishop Fleetwood’s work, and, adopting his arguments as my own, read them from beginning to end.

I cannot carry this matter further; it appears to me that the question has already received a high judicial decision; and although it is not binding upon the Court now (because the Court is entitled to take its own view of the case, and that view may be modified by circumstances), yet I feel convinced that the decision in the case of Kemp and Wickes is one which will be found to bear strictly upon the present; it goes through the authorities on the subject; and the conclusion at which it arrives seems to me perfectly irresistible, that a child baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, is entitled to receive Christian burial from the minister of the parish in which

it dies. In regard to the decision in *Kemp v. Wickes*, it was not to be expected, considering the importance of that decision, that writers would not attempt to impugn it: and much was put forth in opposition to it; but the able writer of that article in the Review, from which I have adopted several arguments, disposes of most of those writers with this single observation,—“that they proved this, “if they proved nothing more, that the question was not at rest.” That learned writer then proceeds to vindicate the decision in *Kemp and Wickes*: his sentiments I will adopt as my own; and I contend that “they who have received Christian baptism at all, “have been baptized either into none, or into every one, of the “members of the body of Christ; that to make a distinction of “baptizing into this or that particular Church is to multiply that “Christian baptism, which by the Apostle is so emphatically pro-“nounced ‘one.’” Again, “that, in any country, they who are “baptized into Christ at all, are, on the one hand, bound, as they “would avoid the guilt of schism, to communicate with the par-“ticular Church planted there; and that, on the other hand, they “have a right to claim from that Church a participation in all acts “of its communion, until they are cut off by a judicial sentence, or “have cut themselves off from Christ’s body. And this brings me “to a consideration decisive, in my apprehension of the question, “relative to the word ‘unbaptized.’ It is the law and practice of “the Church of England, to acknowledge those who are baptized “by schismatics, as baptized, as made by their baptism members “of the Christian Church: for it considers them as under Church “discipline, and sentences them to excommunication if they offend “against its laws. Thus, then, they are recognized by the Church “of England as baptized into the body of Christ: else it would be “worse than nugatory, to cut them off from that body to which “they never belonged. To conclude on this main part of the “dispute: I am clearly of opinion that the meaning ascribed by “Sir John Nicholl to the word ‘unbaptized’ in the rubric before “the office of burial, is fully established by him; that the ex-“ceptions taken against it rest on no solid ground; and that every “additional light thrown on the subject tends only to confirm the “learned judge’s interpretation. When, therefore, I consider that it “was solely because the deceased had been baptized by a schismatic

" hand, that the refusal of burial was defended, and that such  
" baptism appears, on the fullest inquiry, to have been uniformly  
" recognized by the Church of England as Christian baptism,  
" admitting the subject of it into communion with the Catholic  
" Church, I cannot but acquiesce in the judgment pronounced by  
" the Court of Arches,"—a judgment which I submit will be main-  
tained by the Court in the present case.

FRIDAY, FEBRUARY 5th.



*Dr. Nicholl.*—Before I reply to the arguments of my learned friends, I wish to communicate to the Court some information I have received relative to the Gloucester case, to which allusion has been made. I have before me the letter-book of a proctor in this Court, who was, to a certain extent, engaged for the promoter in that case. That case was pending at the same time as the case of Kemp and Wickes, and was entitled “The Office of the Judge promoted by Pitt against Mackay.” The articles having been admitted without opposition, evidence was taken upon them, but in a most extraordinary manner. [Dr. Nicholl read an extract from the proctor’s letter-book, respecting the character of the evidence admitted.\*] Notwithstanding the gross neglect on the part

\* The letter was as follows :

“ *Doctors Commons, December 12, 1809.* ”

THE OFFICE OF THE JUDGE PROMOTED BY Pitt AGAINST MACKAY.

“ Sir,

“ I have perused the depositions in this cause, and beg to observe, that, from the irregular mode in which they are taken by the registrar, it can hardly be contended with effect that the case is proved. A witness ought to be examined to the several facts pleaded in the articles, and his evidence thereon should be taken down carefully and circumstantially. To state that he has heard the article read, and believes the contents to be true, and that he knows nothing to the contrary, is a mode of evidence never I believe before heard of. The important facts to have been proved in this cause were, that Mr. Mackay was rector of Coate, that the child was baptized with water, and in the name of the Father, Son, and Holy Ghost, and that reasonable information was given thereof to Mr. Mackay. In all points the depositions are defective. The fact of Mr. Bedmead being a minister duly qualified might have been proved by his own evidence, and, by referring therein to the certificates annexed to his deposition, he might have made that good evidence auxiliary to his own deposition; but the fact of his being qualified was not essential, inasmuch as, if the baptism has been by a layman or a female, it would have been valid. I have to regret that the advice I gave that this cause should stand over until the decision in the Court of Arches upon the law was given, had not been

of the officer of the Court in taking down evidence in this way, the surrogate condemned the promoter in costs, though the failure of proof arose from mismanagement in his own officer. It appears that no judgment was given in the case, for the promoter declared he proceeded no further, under the judicious advice contained in the letter I have just read, as it is very clear that owing to the mode of taking the evidence there was a failure of proof.

*Dr. Phillimore.*—I laid no stress whatever on that case.

*Dr. Nicholl.*—The case was mentioned, and I was desirous that its real circumstances should be known.

*Dr. Phillimore.*—I think it of no weight.

*Dr. Nicholl.*—The Court is aware that I tendered myself to the Court, on the last court-day, as ready to proceed in reply. I did not, in so doing, mean to undervalue the ability of the arguments which had been adduced against us, but I did so from the strongest confidence that those arguments, however able, had not touched the merits, and could not affect the result of the suit. I trust I did not overrate the strength of our case, or the weakness of that of our opponents. It appears to me that the weakness of the case on the other side consists in the total omission, suppression, and avoidance, of every single point that is important. My learned friends made no reference to what had been the law and practice of the Church

attended to, as the expense of proceeding to a hearing might have been avoided. The question of law having been now satisfactorily decided by the Dean of Arches, that a clergyman is bound to bury a person who has been baptized by a dissenting minister, and is subject to canonical censures for refusing, it does not appear that it will be expedient to further prosecute the above suit. I would advise your proctor to state the above decision (in the case of The Office of the Judge promoted by Kemp against Wickes, yesterday given in the Court of Arches) to the Court, and say that as the object of the present suit was not to punish the clergyman, but to try the question, it is unnecessary to proceed further. I presume the surrogate will hardly condemn the promoter in costs, as the failure of proof arose from the want of knowledge of the officer of his court; and if he should do so, I would advise a strong remonstrance to be made to Mr. Cooke the Chancellor, upon the injury sustained by his declining to sign letters of request to the Court of Arches to sustain the suit, and driving the parties to the necessity of applying for justice to a tribunal whose officers are unacquainted with the forms of administering it; an appeal upon such evidence as this would be nugatory.

“ I am, &c.

“ EDWARD TOLLER.”

“ To J. Webster, Esq. Queen Street.”

for twelve hundred years previous to 1604. They made no reference to the changes which took place in 1604. They made no reference to the fact that, though the bishops were asked to declare lay baptism invalid, no declaration of its nullity was ever issued. They made no reference to the marked and emphatic introduction of the words "two essentials" in different parts of the rubric,—words carefully introduced evidently to guard against any misapprehension arising from the insertion of the words "lawful minister." They made no reference to the known and declared opinions, expressed in writing, and published, of the persons who were engaged in making this alteration. They took up the reported expression of Archbishop Whitgift, (contrary to the express and clearly defined opinion in favour of lay baptism, which that prelate gave in his controversy with Cartwright,) that the Church did not allow lay baptism, by which he meant that the liturgy of the Church did not strictly authorize or require it; and they placed great stress upon this single expression, laying aside entirely the public and declared opinions of that eminent man. They made no reference to what cannot be denied to have been both the law and practice of the Church until the year 1712; and they passed by the testimony of those who were witnesses to the existence of that practice. They forgot the old maxim of law, "*Lex currit cum praxi;*" they forgot that practice is the best interpreter of law. They declined to consider the authorities of the writers we quoted, because they said they were mere expressions of opinion. We invite them to look, not at opinions, but at arguments. We invite them to consider the arguments and facts of Bishop Fleetwood. Will my learned friends attempt to deny his facts, to point out his fallacies, or to refute his conclusions? I deny that, in any one single instance, they will be able to do so. My learned friend says he will not take up Fleetwood, because he is a controversialist. Is he so? He gives a complete answer to all previous arguments against lay baptism; but no one ventured to deny any one of his positions. I do not ask the Court to take the opinions of Bishop Fleetwood, though I think I might do so; but I ask the Court to consider his arguments and his reasonings, and to see if it can detect in them any fallacy or sophism. I contend that, in this case, the Court ought to look to the opinions of such men as Fleetwood; for, on a question of this nature, the opinions of churchmen and divines are most im-

portant. In cases of the law of merchants, are not the opinions of merchants received, and are not their statements taken as to what is the practice? In matters of science, are not the opinions of scientific men received? On questions of law, are not the opinions of text-writers—of the sages of the law—received? Why, then, on a question of divinity, are not the opinions and evidence of learned divines and able theologians to be taken?

My learned friends have dealt in some rather bold assertions, but have adduced very feeble authorities in support of such rash assertions. My learned friend, Dr. Phillimore, asserted boldly and stoutly that there never was such a thing heard of as valid baptism by a schismatic. Afterwards, however, towards the conclusion of his argument, when summing up his authorities, he admitted that Bishop Wilson and Archbishop Bramhall, his only authorities, had stated nothing conclusive on the point of schismatic baptism. But what is the fact? Cyprian, A.D. 248, denied the validity of schismatic baptism, on the ground that schism nulled orders, and consequently that schismatics became mere laymen, and therefore their baptism was not good. This was, however, overruled by the Council of Arles, which decided, a few years afterwards, that schismatic baptism was good. As to authorities in more recent days, Waterland and Lawrence, on the one side, admit that schismatic baptisms are good, because, they say, "the priestly office remains." On the other hand, Bingham and Kelsall admit that schismatic baptisms are good, because they are lay baptisms. On both sides it is admitted that schismatic baptisms, *qua* schismatic baptisms, are good. It may be a question, whether lay baptism, performed by schismatics, is good; not because the parties performing it are schismatics, but because they are laymen; but schism itself does not affect the baptism: the question is, whether the absence of commission affects it. Therefore, in fact, the question is reduced to its old position—that of lay baptism.

I however contend that my learned friends have not, in this case, proved that we are schismatics. In the first place, they have not pleaded it. They have pleaded certain canons, but they have not pleaded that the Wesleyans come within those canons. They have not afforded us an opportunity of counterpleading on this point. They have not given us the slightest means of establishing to the Court that the Wesleyans are not schismatics. My learned friend

Dr. Phillimore admits that the child itself was not excommunicated, but he seeks to fix excommunication upon Mr. Balley. If however we look at the canons which they plead, I think it is manifest that the Wesleyans do not fall within their meaning. The fifth canon, headed "Impugners of the Articles of Religion, established in the Church of England, censured," states—

" Whosoever shall hereafter affirm, that any of the Nine and  
 " Thirty Articles agreed upon by the archbishops and  
 " bishops of both provinces, and the whole clergy, in the  
 " Convocation holden at London, in the year of our Lord  
 " God one thousand five hundred and sixty-two, for  
 " avoiding diversities of opinions, and for the establish-  
 " ing of consent touching true religion, are in any part  
 " superstitious or erroneous, or such as he may not with  
 " a good conscience subscribe unto; let him be excom-  
 " municated *ipso facto*, and not restored but only by the  
 " archbishop, after his repentance, and public revocation  
 " of such his wicked errors."

I contend that the Wesleyans do not deny any one of the Articles. They admit, indeed, the whole of the Thirty-nine Articles. There is no proof that they deny them.

Dr. *Phillimore*.—Is there proof that they admit them?

Dr. *Nicholl*.—It is for you to prove that they deny them. The ninth canon declares—

" Whosoever shall hereafter separate themselves from the  
 " communion of saints, as it is approved by the Apos-  
 " tles' rules, in the Church of England, and combine  
 " themselves together in a new brotherhood, accounting  
 " the Christians, who are conformable to the doctrine,  
 " government, rites and ceremonies of the Church of  
 " England, to be profane, and unmeet for them to join  
 " with in Christian profession; let them be excommuni-  
 " cated *ipso facto*, and not restored but by the archbishop,  
 " after their repentance, and public revocation of such  
 " their wicked errors."

Do the Wesleyans refuse to join in communion with the Church of England? Many of them constantly receive the sacrament of the Lord's Supper in the Church of England. They do not, therefore, consider the "Christians who are conformable to the doctrine,

“ government, rites and ceremonies of the Church of England, to “ be profane, and unmeet for them to join with in Christian profes- “ sion.” On the contrary, the Wesleyans profess to agree with them in doctrine, and almost entirely in discipline. It is clear, then, they do not fall within the meaning of this canon.

The twelfth canon is the only remaining one to which reference has been made. Its heading is, “ Maintainers of Constitutions “ made in Conventicles censured;” and it declares—

“ Whosoever shall hereafter affirm, that it is lawful for any “ sort of ministers and lay persons, or of either of “ them, to join together, and make rules, orders, or con- “ stitutions, in causes ecclesiastical, without the king’s “ authority, and shall submit themselves to be ruled and “ governed by them; let them be excommunicated “ *ipso facto*, and not be restored until they repent, and “ publicly revoke those their wicked and anabaptistical “ errors.”

It is true that, with respect to this canon, Mr. Bond has admitted, certainly with great candour,—but, I must say, with great weakness, and little consideration of what was really the meaning of the canon,—that the Wesleyans do in fact affirm that it is lawful to join together, and make rules, orders, or constitutions, in causes ecclesiastical, without the king’s authority. Mr. Balley does, to a certain extent, admit this, but he qualifies his reply. But can it be said that the Wesleyans as a body, or any part of them, affirm that it is lawful for them to make rules, orders, or constitutions, in causes ecclesiastical, without the king’s authority, or to submit themselves to be ruled and governed by them? It is quite clear that this canon was made, *alio intuitu*, with reference to those conventicles and meetings which took place, under the guidance of Cartwright and others, about the year 1590; and which were relative to the opinions contained in the Book of Discipline, first mooted at Cambridge, and afterwards carried out in the Synod of Coventry, declaring that the appointment of bishops was unlawful, that the queen had no power to make laws for the Church, and so on.\*

\* Vide 3 Fuller, p. 30, A Form of Discipline considered of by the Brethren in a solemn Synod; p. 100, Acts of Synod of Coventry; and p. 105, Articles objected to Thomas Cartwright, particularly Articles 2, 5, 13, 25, 26, 31.

My learned friend Dr. Phillimore, however, contends that the canons of 1603 are specially pointed at such persons as the Wesleyans ; and he calls upon the Court to consider whether a person guilty of an offence at common law could be allowed to proceed as informer against another party for the commission of the same offence. I say, clearly so. Nothing is more common than for a person guilty of an offence to be an informer against parties who have been acting with him in the commission of that offence. Take the case of a prosecution at common law, which is analogous to this proceeding. Suppose A. prosecutes B. for a larceny, would the Court deem it a satisfactory answer to the charge if B. should say to the prosecutor, "Oh ! you have been guilty of a larceny ; I "won't say you've been convicted, but you've been guilty of it ; "and therefore you are unqualified to prosecute." Surely my learned friend will not contend for this.

My learned friend [Dr. Phillimore] has said, "Why do not these "Dissenters bury those who are of their own communion ?" My answer is, because the law gives them a right to be buried in the churchyard ; and, as I apprehend, with Christian rites. But my learned friend says, "In this case they had these Christian rites : "Mr. Escott allowed the child to be buried in the churchyard, and "he allowed a minister of the same persuasion as the parents to "read the service." Did he do so ? If he did, I should like to know what authority he had for so acting. I should like to know what authority any minister of the Church of England has to allow another person, not being a minister of that church, to officiate in his church or churchyard. Such conduct would be a breach of the law ; and would not, I am sure, be sanctioned by this Court.

My learned friend Dr. Phillimore has said that the common law gives a person a right to be buried in a churchyard, but not with the rites of the Church. I apprehend, however, that the right to be buried with Christian rites in the churchyard is a common law right ; but it does not therefore follow that it is enforceable at common law. There are many things which are common law rights, which are not of common law jurisdiction. What is the whole of the canon law of this country ? What force and effect has it in this country, but as part and parcel of the common law of the land ? The canon law has no effect of itself. Blackstone and Hale say that it forms part of the *lex non scripta* of England ; it is only

law as far as it has been received, and as far as it is not repugnant or contrary to the laws, statutes, and customs of this realm. If it is repugnant or contrary to them in any respect, however it may have been received, it is not law. Neither is it law because it forms part of the canon law, if it has not been received and acknowledged as law.

My learned friends have alluded to the case of Andrews v. Cawthorne. It appears to me that, in that case, the learned judge laid it down that the right of persons to burial with Christian rites is part of the common law of the land. He says—"This is most "clear and certain, that by the common law of England no fee is, "or ever was, due for baptism or burial, which are *de jure*, or of "common right." The learned judge, when speaking of burial, clearly alludes, not to the mere thrusting of the body into the ground, but to the performance of the Christian rites of burial. In speaking of burial in the church itself, and not in the church-yard, Mr. Justice Abney says, "And as the parish priest by the "canon was the sole judge of the merits of the dead and the fitness "of burial in the Church, and he would only determine who was "a faithful layman; they only were judged faithful whose executors came up to the price of the priest, and they only were "allowed burial in the church, and the poorer sort were buried in "the churchyard.—But in neither case was any fee claimed or "pretended to be due for the celebration of the office." C. J. Holt, as cited by Mr. Justice Abney, says, "No fee is due of common right "for baptism or burial, and where due it must arise from custom, "and the duty" [i. e. the burial or baptismal service] "must be "performed." Again Mr. Justice Abney says, "The burial of the "dead is the clear duty of every parochial priest and minister, and "if he neglect or refuse to perform the office, he may by the express "words of the canon be suspended by the ordinary for three "months. And if any temporal inconvenience arise, as a nuisance "from the neglect of interment of the dead corpse, he is punishable "also by the temporal Courts." Thus then the common law jurisdiction only attaches, as it would seem, in case of a nuisance. That is the principle upon which it is put. The ecclesiastical jurisdiction is to enforce the performance of the office. The case of the King v. Taylor has been referred to as bearing against us.—That was the case of an information for neglecting to bury,

and not of a mandamus to bury. The Court was on a previous day referred to the affidavits in that case. The first affidavit states — [Dr. Nicholl quoted from the affidavit, commencing, "That "Sarah Carter was born at Daventry," &c.] An application was, on this, made to the Court of Queen's Bench, for a criminal information against Mr. Taylor for not burying the body, it being averred that the person had been baptized. Affidavits were subsequently brought in on the other side.

*Dr. Phillimore.*—My learned friend has not read the affidavits on the part of the minister. It appears to me that he gave a most satisfactory answer to the affidavits on the other side.

*Dr. Nicholl.*—Then I will read the affidavits to which my learned friend refers. [Dr. Nicholl read the affidavits of the sexton and the minister, in the case of the King v. Taylor.]\* Now I admit that, in this case, Mr. Taylor might be justified in his refusal. If he believed that the woman had not been baptized, and offered to allow the body to be buried in the churchyard, without the performance of the funeral rites, he then did obey the law of the land, which directs that the funeral service shall be read over the bodies of deceased persons, except where such persons have not been baptized, or are *felo de se*, or excommunicate. If the person in that case was not baptized, or if no proof or assurance was given or tendered that she had been baptized, Mr. Taylor was justified in refusing to perform the burial service, and was bound by the law, as laid down in the case of Kemp and Wickes to refuse it. This case does not, therefore, in any respect, make against us. On the contrary, it is rather for us, because it shows that by the common law no fee is due either for baptism or burial of common right, and that the duty must be performed, except in the excepted cases.—That is, it establishes, as I contend, that the right of burial with Christian rites, is a common law right; that is, a right by and under the common law, but it does not therefore follow that that right is of temporal jurisdiction:—that is quite a different matter. Church rates are a liability by common law, but they are not of common law jurisdiction; they are of ecclesiastical, and not of temporal cognizance. In the case of the King v. Coleridge, 2 Barnewall & Alderson, 806, Chief Justice Abbot says, "It may be " admitted for the purpose of the present question, that the right

\* These affidavits are inserted in Appendix II. p. 291.

" of sepulture is a common law right ; but I am of opinion the " mode of burial is a subject of ecclesiastical cognizance alone. If " a clergyman should absolutely refuse to bury the body of a dead " person brought for interment in the usual way, I am by no means " prepared to say that this Court would not grant a mandamus to " compel him to inter the body. But in so doing we should be " acting in aid of the Ecclesiastical Court, for that Court would " compel the burial although not in so speedy a manner as by man- " damus." The common law, therefore, will aid the Ecclesiastical Court, in compelling, by *mandamus*, the burial of a body. It is clear then, that burial is a matter of common law right, and this is what I contend for. The Courts of Common Law admit that it is a common law right, and that it is enforceable in the Ecclesiastical Courts, of common right ; and the temporal Courts are not prepared to say that they will not, in aid of the Ecclesiastical Courts, enforce that right. But this right is confirmed by the rubric, which rubric is itself part and parcel of the statute law of the realm ; for the rubric directs that, except in three specified cases, " the minister " SHALL meet the corpse at the church gate, and SHALL read the " service over the body." It is not discretionary with the minister whether the service shall be performed or not. It is a right which may be enforced through the Ecclesiastical Court, — the only legal tribunal to which appeal can be made, for the temporal Courts will not interfere. The ordinary has no discretion in the case.

My learned friends have referred to the letter of Bishop Kennett to Mr. Stileman. The case to which that letter refers was, undoubtedly, one of very difficult decision. It was the case of a person, who, according to the statement we have, absolutely and entirely repudiated his baptism,—who denied that he was a baptized person. The points Bishop Kennett desires to be inquired into, are, first, whether he had ever been baptized ; and, secondly, whether he had repudiated that baptism, and had not withdrawn such repudiation. The opinion which Bishop Kennett gives is a very doubtful one. The Bishop states, in his letter, that if it should be found that the person had not been baptized, or had repudiated his baptism, then he thinks that, under such circumstances, the clergyman might be justified in refusing him burial : on the first point Bishop Kennett was clearly right — on the second doubts may reasonably be entertained — he however proceeds, " but, at any

" rate, if I were to perform the burial service, I should omit certain parts of that service." The very fact of Bishop Kennett's stating that he would leave out part of the burial service, renders his authority of little weight; for it is clear that a clergyman would not be justified in leaving out any part of that service. I am not aware that a bishop has the power of giving authority to a clergyman to omit any part of the services of the Church.

*Dr. Phillimore.*—In the preface to the Book of Common Prayer, it is directed that if a minister shall entertain doubts respecting anything there incontained, he shall resort for their solution to the bishop of the diocese.

*Dr. Nicholl.*—What is the diocesan, when so resorted to, to do? Is he not, specially, in a most direct and positive manner, enjoined not to alter any thing contained in this book? The preface says: " And forasmuch as nothing can be so plainly set forth, but doubts may arise in the use and practice of the same; to appease all such diversity (if any arise) and for the resolution of all doubts, concerning the manner how to understand, do, and execute, the things contained in this book; the parties that so doubt, or diversly take any thing, shall alway resort to the bishop of the diocese, who by his discretion shall take order for the quieting and appeasing of the same; so that the said order be not contrary to anything contained in this book. And if the bishop of the diocese be in doubt, then he may send for the resolution thereof to the archbishop." So that the very passage which directs a person in what manner to obtain the solution of a doubt, declares that, in the interpretation of such a doubt, no order shall be made contrary to anything contained in the Book of Common Prayer. And I maintain that if, in the interpretation of such a doubt, the bishop of the diocese should err, his mistake is corrigible not only by the archbishop, if he is addressed on the subject, but it is also corrigible in a proceeding against the clergyman acting under the bishop's solution, by the Ecclesiastical Courts of this country, and, on final appeal, by the Judicial Committee of the Privy Council. Therefore, the opinion of Bishop Kennett being contrary to the law, cannot be held good; it could only be binding so far as it gives a correct interpretation of what really is the law.

*Dr. Phillimore.*—It cannot be said that there was not great doubt

entertained on the subject, and that the bishop has not given a sound and judicious opinion.

Dr. Nicholl.—I do not attempt to deny that there was a doubt on the question; but I say that Bishop Kennett resolved that doubt contrary to the law. If he did so, the only means of deciding the matter would be by bringing it before a Court of Law. It was a wise course, on the part of Mr. Stileman, to resort to Bishop Kennett for an interpretation of the doubt he entertained; and I think that, in this case, it would have been prudent had Mr. Escott resorted to the bishop of the diocese for a solution of his doubt. The diocesan is, however, subject to superior control, for the law requires that he shall not make any order contrary to the law; and how is the infraction of that law to be determined, except by a Court of Law?

Now as to the question of excommunication. My learned friends have admitted that the child in the present case was not excommunicate; but they say that the minister, Mr. Balley, who administered the baptism, was excommunicated. I have already contended that the Wesleyans as a body, and Mr. Balley in particular, do not fall within the meaning of the canons as respects excommunication. I say, in the first place, that Mr. Balley was not excommunicated; and, in the next place, that even if he was excommunicate, he could administer valid baptism. First, then, with respect to *ipso facto* excommunication. I contend that a declaratory sentence of excommunication is required, unless the fact of a person being excommunicated was perfectly notorious. I will quote from my learned friend's favourite authority, Wheatley, who is clear on this point; premising however that Bingham states that, according to the old canon law, three admonitions are necessary before a person is denounced excommunicate; and then the communication of the fact of such excommunication is made to all other churches, and the party so denounced is considered excommunicate by the Church in general. But after a person was pronounced excommunicated, *majori excommunicatione*, parties who associated with him were not themselves excommunicated, until the person so excommunicated was publicly denounced excommunicate.\* The meaning of the term "denounced excommunicate" is,

\* Bingham's *Antiquities of the Christian Church*, Book xvi. Chap. ii. Sects. 1, 2, 6, 7, 8, 9, 10, 11.

as I shall presently show, much stronger than that of the word "pronounced." A person under a sentence of excommunication is pronounced excommunicated; but he is not denounced excommunicated till he has been so denounced by the minister of his parish. Wheatley says (in chap. 12, sec. 1.):—"And yet this learned gentleman (Johnson) observes just before, that the judges have declared that excommunication takes no effect as to the common law, till it be denounced by the ordinary and curate of the place where the offender lives." He also refers to Lyndwood to show that, "if the fact be not notorious, or evident beyond exception, then it must be proved, and the sentence passed in the Ecclesiastical Court, before the criminal can be taken for excommunicated *in foro ecclesiæ*. It is true Mr. Johnson is here speaking of a case where the fact is not notorious, but then he goes on to prove from the same author (*i. e.* Lyndwood), that though the fact be notorious, the offender must be publicly declared excommunicated before it can be criminal for other persons to converse with him; from whence I would infer that so long as he is allowed the conversation of Christians, he may also be indulged with a Christian burial."

And I beg the Court to remember the words of Bingham, which my learned friend quoted with reference to schismatics and heretics, "actually denounced excommunicate." Wheatley also says: "Wherever a canon says, that a criminal is *ipso facto* excommunicated, the excommunication takes place as soon as he is tried and found guilty of the crime, without any one's pronouncing any other sentence upon him, than that by virtue of his crime, he is and has been excommunicated by the canon; and that not only from the time he is proved convict, but from the very time that he committed the fault. Insomuch that all the advantages, penalties and forfeitures, that may be taken and demanded of a person excommunicated, may be taken and demanded of such a person, quite back to the time when he committed the fact for which he is now declared excommunicate. But still, though a criminal becomes liable to this censure from the very instant he commits the crime; yet he cannot legally be proceeded against, nor treated as excommunicate, before he is actually convicted, and declared so to be."

Again Wheatley, after speaking of what the canonists say

“ of shunning the company of one known to have suffered excommunication,” proceeds: “ but this does not affect the question between Mr. Johnson and me. The question between us is “ about denying a man the sacraments and public offices of the “ Church, which the canonists assert every man may claim TILL IT “ APPEARS LEGALLY that he has forfeited his right to them. And “ therefore (which is the principal point here concerned) no man “ can be refused Christian burial, however subject he may have “ rendered himself to an *ipso facto* excommunication, unless he has “ been formally tried and convicted, and actually pronounced and “ declared excommunicate, and no man is able to testify of his “ repentance.”

Then what says our own Church in this matter. What is the sense of the other canons, enacted at the same time with this canon respecting burial? The 65th canon is in these terms:—

“ Ministers solemnly to denounce recusants and excommunicates. All ordinaries shall, in their several jurisdictions, carefully see and give order, that as well those who for obstinate refusing to frequent divine service established by public authority within this realm of England, as those also (especially of the better sort and condition) who for notorious contumacy, or other notable crimes, stand lawfully excommunicate, (unless within three months immediately after the said sentence of excommunication pronounced against them, they reform themselves, and obtain the benefit of absolution), be every six months ensuing, as well in the parish church, as in the cathedral church of the diocese in which they remain, by the minister openly in time of divine service, upon some Sunday, denounced and declared excommunicate, that others may be thereby both admonished to refrain their company and society, and excited the rather to procure out a writ *de excommunicato capiendo*, thereby to bring and reduce them into due order and obedience. Likewise the registrar of every Ecclesiastical Court shall yearly between Michaelmas and Christmas duly certify the archbishop of the province of all and singular the premises aforesaid.”

There is, therefore, a sentence to be pronounced ; and what is directed by this canon to be done subsequently, is not to take place till three months after the pronunciation of the sentence, and then others are to be " excited to procure out a writ *de excommunicato capiendo*." Now my learned friends will not contend that a writ *de excommunicato capiendo* can be issued till a sentence of excommunication has been pronounced. The quotation then adduced by my learned friends from Bingham, coupled with the 65th canon, prove that excommunication, as far as it affects the rights of schismatics or heretics, only takes effect from three months after the sentence has been given, and after it has been publicly denounced from the reading-desk of the parish church. But even if this were not so, I say that the canons of 1603 are not, *proprio vigore*, binding upon the laity. They are only binding on the laity as far as they are declaratory of the law previously in force ; and as respects the Canon Law, it is only binding so far as it has been received in this country, and so far as it is not contrary or repugnant to the laws, statutes, and customs of this realm. But Lord Mansfield, in the Chamberlain of London's case, reported in Burn under the head " Dissenters," says that " Non-conformity is no offence at Common Law." My learned friend, [Dr. Harding], when referring to the Toleration Act, quoted the case of the Attorney-General v. Pearson, 3 Merivale, 352. That case however related to a person who denied the doctrine of the Trinity ; and Lord Eldon, in giving judgment, says, that the Toleration Act relieves Dissenters from the consequences of penal statutes, but it does not alter their *status* at common law. The denial of the doctrine of the Trinity was, at common law, an indictable offence ; and it still remains so. Mere non-conformity, however, is no offence at common law, and as far as it was an offence created by statute law the Toleration Acts have removed that offence. Thus, then, those canons of 1603, which declare persons excommunicate for non-conformity, are not binding on the laity, because they are not declaratory of the common law or the existing statute law, nor on the clergy, because they have become repugnant and contrariant to the common and statute law of the land. But it is said that I cannot avail myself of part of the canons of 1603, without taking the whole of them. Cannot I take that part of them which is unrepealed, and reject that portion which has been repealed ? Cannot I take that part of them which not being then or now repugnant to the law of the land was

adopted by the framers as binding on themselves and those whom they represented ; and reject that part which relates to others, whom they had no authority to bind—who were not represented in the Convocation, and therefore could not be bound by the acts of that Convocation ? I maintain that I can avail myself of a portion of those canons, and reject the other part. It has been insinuated rather than argued, that the Toleration Acts do not apply to the Wesleyans, because they are not Dissenters. It is unnecessary to inquire whether in the eye of the law they are or are not Dissenters, for whatever the earlier Toleration Acts may be, at least the 52nd Geo. III. does not speak of Dissenters *nominatim*, but of Protestants generally ; indeed, the words are so general, that it has been a question whether that act is not applicable to the public worship not only according to the rites and ceremonies of the Church of England, but actually performed by a minister of the Church of England in his character as such. In the case of Carr v. Marsh (2 Phillimore 198), the question was raised, whether a clergyman of the Church of England officiating as such, in a congregation worshipping according to the rites and ceremonies of the Church of England, was not, by that act, protected from ecclesiastical censures for so officiating without the consent of the incumbent of the parish. It is very true that the Court held, and as I think most properly held, that the statute did not apply to such a case ; but the very fact that the point was raised, argued, and solemnly decided on in a court of justice, proves that the words of the statute are of a very comprehensive nature ; and I venture to assert, that no lawyer can seriously maintain that they do not extend to the Wesleyans.

It has been contended that the framers of the 68th canon never intended it to have applied to such a case as this. I contend, however, that if, at that time, these persons had been in such a situation as they are now placed in by the Toleration Acts, it is quite clear that the 68th canon would have been applicable to them. I contend that it was meant to apply to persons in the situation in which Wesleyans now are, because the act of parliament passed at that time (3 Jac. I. c. 5), requiring the burial of Popish recusants, clearly refers to this canon, and evidently intimates that under and by virtue of that canon, ministers were compelled to bury Popish recusants with ecclesiastical rites. The

words of the 15th section of the statute are,—“ If any Popish “ recusant, man or woman, not being excommunicate, shall be “ buried in any place other than in the church or churchyard, or “ not according to the ecclesiastical laws of this realm,” then the executors shall forfeit, &c. &c. Why are the words “ not being “ excommunicate” introduced ? Because the 68th canon only requires ministers to bury persons who were not excommunicate. Therefore, the act excludes Popish recusants who are excommunicate, but requires that all other Popish recusants shall be buried in the churchyards, and that they shall be so buried according to the ecclesiastical laws of the realm, that is, according to the rites of the Established Church. This clearly shows that, at that time, the legislature distinctly contemplated the application of this 68th canon to persons who were schismatics ; for my learned friends will not deny that, in the eye of the Church of England, Papists are schismatics. I think I have already shown the Court that the Wesleyans are not proved to be schismatics.

*Dr. Phillimore.*—The canons were adopted long prior to the act to which you have referred.

*Dr. Nicholl.*—Two years before. The statute was passed in 1605.

*Sir HERBERT JENNER.*—The argument is, that the legislature, in framing that act, had a direct reference to the 68th canon.

*Dr. Nicholl.*—I submit then—1st. That Wesleyans are not shown to be schismatics ; 2d. If schismatics, that they are not shown to be excommunicate ; 3d. That whether schismatics or not, whether excommunicate or not, that the validity of baptism administered by them is not thereby affected. That such baptism stands precisely on the same footing as a lay baptism. Then my learned friends have contended that, in order to render lay baptism good and valid, there must be a necessity for its performance. I do not deny that, in order to make lay baptism regular, a case of necessity must be established. But, I ask my learned friends, in what single instance can they show that lay baptism, administered not in a case of necessity, was held to be invalid ? When was it ever reiterated ? I defy my learned friends to show an instance. The rubric, restricting the administration of private baptism to cases of necessity, applies to the rite when ministered by a lawful minister as strongly as the former rubrics did to baptism administered by laymen. Far be it from me to attempt to justify or approve of the administration

of baptism in private houses by ministers of the Church of England at any time, except under circumstances of the greatest and strongest necessity. But do not innumerable instances occur day by day in this very metropolis, and throughout the kingdom, under the sanction of very high authorities in Church and State, of the administration of baptism in private houses, without the existence of any necessity? Were such baptisms ever held to be invalid? The rubric says, "And also they shall warn them, that without like "great cause and necessity they procure not their children to be "baptized at home in their houses. But when need shall compel "them so to do, then baptism shall be administered on this fashion." *Need*, then, is as necessary now for the baptism by ministers in private houses as it formerly was for baptism by laymen. Need is, according to the law of the Church, the only thing that authorizes a minister to perform private baptism. But will my learned friends contend, that the absence of such need renders the rite of baptism administered by a clergyman of the Church of England, in a private house, invalid? Look at the consequences of maintaining that the absence of need in such a case would render the rite invalid. If it were so, who is to decide upon what constitutes the need? The minister of the parish of St. Benet's might say that certain circumstances justified the performance of the rite; while the minister of St. Dunstan's might be of opinion that, upon the same circumstances, no necessity was shown. Should the Christian *status* of a child depend upon the varying, uncertain, fluctuating opinion of different ministers? The curate of to-day might, in such case, utterly differ in opinion from the incumbent of to-morrow. It is absolutely impossible, I contend, that the question of necessity can affect the validity of the baptism, however much it may affect the propriety and regularity of the administrator's conduct.

I now come to the Act of Uniformity, upon which great stress has been laid by my learned friends. I am ready to admit that much of their argument would have been very stringent if it had applied to the establishment for the first time of a new law on a new subject,—to a new system, to which interpretation or explanation had never been given by law, by practice, or by usage. But when it is considered as applying to a subject with which every one was familiar,—a subject on which the law and practice of the Church had been established for upwards of 1200 years,—a subject

which had been discussed over and over again, and the practice with regard to which had been recognized by councils and by bishops,—the argument is not so stringent as, at first sight, it might appear. I admit that this act of parliament was peculiarly addressed to churchmen,—that it peculiarly applied to Church matters,—and that, therefore, it must generally be interpreted according to the technical sense previously applied to such words by churchmen in Church affairs. But, let me ask, what is the technical sense, and where are we to find it? Not, as I submit, only in the body of the statute, as would be the case if the subject were entirely new;—but inasmuch as the subject and the word are of great antiquity, we must search for the technical sense which had been established by antecedent use,—by the law and practice of the Church,—in what had been held good and valid by the Church,—for the immediately preceding 1200 years. When I am told that a child is unbaptized, I must, in order to determine the point, consider what, according to the councils of the Church, according to the bishops of the Church, according to the legislature of the Church, according to the rubries of the Church, and according to the practice of the Church, had been deemed up to that time valid baptism. Now let us look at the nature of this Act of Uniformity. It applies almost, if not entirely, to *public* worship. Its title is, “An “Act for the Uniformity of Public Prayers; and Administration of “the Sacraments, and other Rites and Ceremonies: And also for “establishing the Form of making, ordaining, and consecrating “Bishops, Priests, and Deacons in the Church of England.” At the end of the preamble are these words: “All which his majesty “having duly considered, hath fully approved and allowed the “same, and recommended to this present parliament that the said “Book of Common Prayer . . . . be the book that shall be ap-“pointed to be used by all that officiate in all cathedral and col-“legiate churches and chapels, and in all chapels of colleges and “halls, in both the Universities, and the colleges of Eton and “Winchester, and in all parish churches and chapels within the “kingdom of England, dominion of Wales, and town of Berwick-“upon-Tweed, and by all that make or consecrate bishops, priests, “or deacons in any of the said places.”

All this has reference to public worship in churches and chapels; “In regard that nothing conduceth more to the settling of the peace

" of this nation . . . . than an universal agreement in *public worship*, and to the intent that every person within this realm may " certainly know the rule to which he is to conform in *public worship*," and administration of the sacraments, and other rites and ceremonies, &c.

Then follows the enacting clause, "That all and singular ministers " in any cathedral, collegiate, or parish church or chapel, or other " place of *public worship*, shall be bound to say and use the morn- " ing prayer, evening prayer, and all other the public and com- " mon prayer, in such order and form as is mentioned in the book " annexed to this present act. . . . . And that the morning " and evening prayers therein contained shall upon every Lord's " Day, and upon all other days and occasions, and at the times " therein appointed, be openly and solemnly read by all and every " minister or curate, in every church, chapel, or other place of " *public worship*, within this realm of England, and places afore- " said."

Again, sect. 3. "And to the end that uniformity in the public " worship of God (which is so much desired) may be speedily " effected," it then enacts that every parson, &c. shall in the church, chapel, or place of public worship belonging to his benefice or pro- motion, openly and publicly declare his unfeigned assent and con- sent to the use of all things in the said book contained.

Sect. 7 also applies to the administration of the sacraments in the parish church or chapel.

The result of the whole is, that all ministers of the Established Church, in the churches and chapels of that Church, shall be bound to use this form in the performance of public worship. Perhaps it may go still further, and require that all ministers of the Church of England, whenever they administer the sacraments, shall use this particular form. The enacting words, however, clearly apply to the ministers of the Church of England, and do not apply to any other persons whomsoever but such ministers, fellows of colleges, tutors, and schoolmasters.

Sect. 17 is most important, for it applies to the administration of the sacraments.

" And be it further enacted by the authority aforesaid, That no " form or order of common prayer, *administration of sacraments*, " rites or ceremonies, shall be *openly* used in any church, chapel, or

“ other *public place* of or in any college or hall in either of the Universities, the colleges of Westminster, Winchester, or Eton, “ or any of them, other than what is prescribed and appointed to “ be used in and by the said book.” And these, I believe, are the only words forbidding the use of any other form to be found in the whole act. All the other sections affirmatively, but, as I admit, expressly and positively, enjoin the performance of public worship, and the administration of both sacraments, by ministers of the Church of England, in the churches and other places of public worship, in such order and form as is mentioned in the Book of Common Prayer ; but there are no words (save as to the Lord’s Supper in the 14th section) which require the sacraments to be administered in that order and form in any place other than a place of public worship, or by any person other than a minister of the Church of England.

Thus sect. 5 looks only to ministers of the Church of England : “ All and every such person who shall neglect or refuse,” (to subscribe as before ordained), “ shall *ipso facto* be deprived of all his “ ecclesiastical benefits and promotions.”

It is further enacted by sect. 13, “ That no person not already “ episcopally ordained, or who shall not receive such episcopal “ ordination before a day named, shall have or hold his parsonage, “ or other ecclesiastical promotion, but shall be utterly disabled, “ and *ipso facto* deprived of the same.”

I beg the Court to mark that, previous to this time, persons not episcopally ordained might hold ecclesiastical promotion in the Church. An alteration, however, was now made in the law, which alteration is clearly pointed out in the preface to the Ordination Service. Inasmuch, however, as the alteration made in the law in that respect was an important one, the legislature was not satisfied with pointing it out in the Ordination Service, but makes an express enactment setting forth the alteration. How contrary is this to what it is contended was done when the law and practice of the Church as to baptism was to be altered ; then all was left to inference,—not only was not the intention clearly expressed in the rubric,—but no contemporary law was passed, no public notification was issued, intimating that a change had been made.

Again, by sect. 14, “ Be it further enacted, That no person “ whatever shall thenceforth be capable to be admitted to any par-

“ sonage, or other ecclesiastical promotion or dignity whatsoever, “ nor shall presume to consecrate and administer the Holy Sacra-“ ment of the Lord’s Supper, before such time as he shall be “ ordained priest, according to the form and manner in and by the “ said book prescribed, unless he have formerly been made priest “ by episcopal ordination, upon pain to forfeit for every offence the “ sum of 100l.”

Thus, then, whether in public or private, no one but a priest shall administer the Holy Sacrament of the Lord’s Supper. In vain you search for any parallel enactment forbidding any one but a lawful minister from administering the sacrament of baptism in private.

The 14th section follows almost literally the form of the preface to the Ordination Service ; and contains, as I have said, an express enactment that no one but a priest shall be allowed to officiate at the administration of the communion. Let us look, then, at the rubric to the Communion Service, and see whether this might not have been inferred from the rubric, at least as clearly, if not more clearly, than the necessity of a lawful minister to the validity of baptism could be inferred from the alteration of the rubric in 1603. Throughout the service for the administration of the Holy Communion the word “ Priest” occurs again and again. “ The priest, “ standing at the north side of the table, shall say the Lord’s “ Prayer.” “ Then shall the priest, turning to the people,” &c.

Sir HERBERT JENNER.—The word “ curate” occurs all along in the preface to the Communion Service.

Dr. Nicholl.—According to Fleetwood, the words “ curate” or “ minister,” in the language of the Church, mean a priest. I believe that, in every part of the Communion Service, a priest is essential.

The Queen’s Advocate.—The deacons administer the cup constantly at the communion, I believe.

Dr. Harding.—The rubric to the Communion Service says, “ Then shall the minister first receive the communion in both kinds “ himself, and then proceed to deliver the same to the bishops, “ priests and deacons, in like manner (if any be present), and after “ that to the people also in order, into their hands, all meekly “ kneeling.”

Sir HERBERT JENNER.—There the word “minister” must mean the priest.

Dr. *Nicholl*.—I think it is quite clear that by the rubric, as far as affirmative words go, it is necessary that the communion should be administered by the priest. The legislature, however, was not satisfied to leave the matter thus, but by the Act of Uniformity it publicly and expressly enacted that the communion should be administered by the priest; although it might be inferred, from the introduction of the word “priest” in the rubric, that it must be administered by a priest. The Sacrament of the Lord’s Supper, therefore, is forbidden to be administered by any person but a priest—either in public or in private,—but there are no words in the act restricting the private administration of baptism to a lawful minister.

My learned friends referred to portions of the rubrics to show the necessity of the performance of baptism by a minister in order to its validity. Their quotations, however, were made not from the rubrics in the order for the administration of private baptism, but from those in the order for the administration of public baptism, and the form of ministration of baptism to such as are of riper years. My learned friends have also alluded to the thirtieth canon, respecting the use of the cross in baptism; but that canon can have no reference to private baptism, inasmuch as the use of the cross in private baptism is nowhere enjoined. My learned friends have said that the form for the ministration of baptism to such as are of riper years was introduced specially with reference to persons who had been baptized by laymen. The preface to the Book of Common Prayer, referring to that service, mentions that “It was “thought convenient that some prayers and thanksgivings, fitted to “special occasions, should be added in their due places; par-“ticularly for those at sea, together with an office for the baptism “of such as are of riper years: which, although not so necessary “when the former book was compiled, yet by the growth of Ana-“baptism, through the licentiousness of the late times crept in “amongst us, is now become necessary, and may be always useful “for the baptizing of natives in our plantations, and others con-“verted to the faith.” It is clear, then, that this service for the baptism of such as are of riper years, was intended to apply to Anabaptists, to natives in our plantations, and others converted to

the faith ; and that it was not intended to refer to the great mass of people at that time in this country who had been baptized by lay hands. But as to the words "lawful minister" in the rubric of private baptism : It is, I submit, most natural and most proper that every Church should, in its public rituals, set forth only the regular and approved mode of administering its rites ; it would not encourage irregularities by introducing allusions to them into its forms of service. But this circumstance does not show that other modes of administering those rites, varying from those approved by the Church, must, however irregular, be necessarily invalid. It is mentioned by Fleetwood, that in the Church of Rome, where the validity of lay baptism is admitted without any doubt, the public ritual applies entirely to baptisms administered by priests.

My learned friends have said that, with reference to baptism in such a case as the present, a minister of the Church of England would have great difficulty in certifying that all had been well done, and according unto due order. It strikes me, on considering the interposition of these words in the rubric—"which are essential parts of baptism,"—that it is quite clear the Church of England considers all things well done, and according unto due order, if the essentials of baptism have been observed,—if the sacrament has been administered with the proper element, and the invocation of the Trinity ;—but if they scruple as to this, why do they not scruple to certify that all was done in due order, when there is no proof that there was any necessity for the private baptizing of a child, even where the administrator was a lawful minister? Private baptism is not more in due order when performed by a lawful minister without necessity, than when performed in a case of necessity by a layman. But is it clear that it is necessary to certify at all? Bishop Mant—if the notes to which allusion has been made are to be considered as expressing his own opinion—seems to think that a minister of the Church of England may, according to circumstances, adopt one of three courses : he may certify that all has been well done ; he may hypothetically baptize—or he may remit the child to those who brought it, without either hypothetical baptism or reception into the Church ;—but it is worthy of observation, he does not offer the slightest suggestion that, where it is clear that the child has been sprinkled with water in the name of the Father, of the Son and Holy Ghost, that it is to be baptized anew, either ab-

solutely or hypothetically. I quote from the notes to Mant's Common Prayer : " When a child is brought to be received which was " baptized by some other hands, we ought to be punctual in putting " the interrogatories relating to that private baptism, and in " requiring the parties that are interrogated, to be clear and explicit " in their answers. Bishop Cosin's note at this place, which he " designed for a rubric, was this, ' To every one of these questions " must answers be directly given by those who bring the child ; ' " and with good reason, because upon these answers depends our " direction, either, first, to ' certify that in this case all is well done, " and according to due order ; ' or secondly, to use the public " office of baptism, with the hypothetical form ; or thirdly, to remit " the child to those who brought it, without either hypothetical " baptism, or reception into the congregation.' Now I would not impose this upon the Court as Bishop Mant's opinion. It is the opinion of Archdeacon Sharpe, introduced among the notes of Bishop Mant, as the opinion of an able writer and learned divine ; but if the notes to the Mant's Common Prayer Book are examined, I think it will be found that Bishop Mant does not intend to give to all the opinions introduced into these notes the sanction of his approbation ;—he has given, I think, in different parts of his work, the opinions of persons who take different views of various questions, without stating what was his own opinion on such questions.

My learned friends argued, that the meaning of the word " unbaptized" must be construed according to the sense of the ritual with which it is associated, that every person must be considered unbaptized who has not been baptized in the form set forth in, and forming part and parcel of, the same law. Again, my answer is, that if this were the introduction of a new word, the argument might be sound—but I contend that the rubric then introduced as to the refusal of burial to persons unbaptized was not a new law, but was only declaratory of the old law—and that you must interpret it as it had been interpreted by the law and practice of the Church for the 1200 years immediately preceding, and that a person who is unbaptized must be the converse of a person who is baptized ; and that, according to the indisputable law and practice of the Church for 1200 years, a person must be held to be baptized who has been sprinkled with water, in the name of the Father, and of the Son, and of the Holy Ghost, by any person

whatsoever, be he a priest, or be he a layman,—be he a member in full communion with the Church, or be he a heretic or schismatic—provided the words themselves are used *in fide sancti Trinitatis*. That is the only limitation, if limitation it be, as to the validity of baptism recognized by the Church for 1200 years. My learned friend has asked why the word “unbaptized” was introduced into the rubric in 1661, if it was not meant thereby to exclude from burial persons not baptized according to the ritual set forth in the Book of Common Prayer ; for, as he argues, if the word “unbaptized” was intended to be used in the general sense which we attribute to it, its introduction was unnecessary, inasmuch as by the clear law of the Church such persons were always excluded from Christian burial. I answer by another question, Why does the rubric, then for the first time introduced, also exclude from Christian burial persons *felo de se* and excommunicate ? From the very earliest ages, persons excommunicate, and persons *felo de se*, were as much excluded from Christian burial as persons unbaptized. But the reason for the mention of all three is quite clear. The 68th canon required the ministers of the Church to bury with Christian rites all persons except those excommunicated *excommunicatione majori*. A doubt and difficulty were thereby created which it was thought proper to remove—the old law of the Church was not intended to be altered by that canon, and the rubric of 1661 so declares. The argument as to the non-necessity of introducing the word “unbaptized” equally applies to the introduction of the terms “*felo de se*” and “excommunicate.” No new meaning is intended to be given to those two terms—then why to the term “unbaptized”?

I admit, then, my learned friend’s own rule—for I believe it is the best that can be laid down—that the word “unbaptized” must be interpreted according to the sense and meaning which is given to it by churchmen. I ask, then, what is the sense and meaning which churchmen give to this term, and which they have at all times put upon it ? Without looking at the controversy of later days, but merely to earlier times, I answer that it is clear from the year 400 to 1604, that by persons unbaptized were meant persons who had not been admitted into the visible Church by being seriously sprinkled with water, in the name of the Father, and of the Son, and of the Holy Ghost. From 1604 to 1661, it is evi-

dent, from the indisputable practice, and from the opinion of all divines, that this was still the sense and meaning attributed to this word in the Church. That this was the true technical meaning applied to this term by the individuals under whose superintendence the alterations in the rubric took place, is proved by the fact that Bishop Cosin, and others who took part in promoting those alterations, considered lay baptism valid. Some of them committed their opinions to writing previous to 1661 ; and Mr. Thorndyke in 1662. I submit, then, that I have established beyond all cavil what is the true meaning of the word “unbaptized,” in the sense held by the Church.

But we have also, in 1712, the practice of the Church ascertained and determined by the unanimous declaration of all the bishops. It is true the publication of the declaration was not unanimous, but the opinion was unanimously concurred in by all the bishops of the Church. Bingham says that he was informed by Bishop Trelawney that the bishops of both provinces unanimously agreed with him that lay baptism was valid. It is true that Bishop Trelawney and the Lower House objected to this declaration being put forth ; and why ? Because the Lower House deemed lay baptism invalid ? Certainly not. Atterbury, who was then a member of the Lower House of Convocation, in his “Epistolary Correspondence,” vol. iv. page 446, says, addressing Bishop Trelawney, “Your lordship seems thoroughly sensible of the ill “consequences that would attend our determination of the point “relating to the validity or invalidity of lay baptism. Either way “we should do great mischief, and therefore my utmost endeavours “were bent last year towards preventing any decision.... Mr. “Bingham is certainly in the wrong to suggest that there ever was “any design in the Lower House of Convocation to declare the “invalidity of lay baptism. All our aim (I am sure, all my aim) “was to declare nothing at all concerning it.”

I shall not be tempted again to enter into the controversy as to the canon of 1575. My learned friend (Dr. Phillimore) says that canon received the sanction of the Queen, as the head of the Church, and it therefore was legal. I never heard so unconstitutional a doctrine promulgated in any Court. On what ground can my learned friend contend that a canon made by the two Houses of

Convocation, with the consent of the Queen, could abrogate the Statute Law.

I wish my learned friends had grappled with the alteration which took place in the rubric in 1604. When they came to that part of the case however, they avoided it in every possible way. The Church was asked to declare lay baptism null; and, in 1604, an alteration was made in the rubric. The rubric, however, when thus altered, contained no express prohibition of lay baptism. There are in it no such prohibitive words as "*none other*" than the lawful minister shall administer baptism; still less is there any declaration that baptism performed by other than "lawful ministers" shall be null and void. It only indicates the regular form of administration. Wheatley is the only authority my learned friends have found holding that baptism administered by laymen is null. Even Lawrence, their great champion, did not feel confident that such baptism was null, for he was only hypothetically baptized. Bacon and Taylor do not state that lay baptism is invalid or null. Not one of these authorities of my learned friends says that lay baptism, if properly administered, is invalid.

My learned friend Dr. Harding appealed to the Scotch and Continental Churches, to obtain some support for his position; but not one of the quotations he has produced from the rituals of the Church of Scotland or of foreign Churches, except, I think, one from the French Church, intimates that lay baptism is to be considered invalid or null. My learned friend quoted the authority of Melancthon. His opinion may be fairly collected from the Liturgy of Herman, which, according to Archbishop Laurence,\* was drawn up by him in conjunction with Bucer, and was freely used by the compilers of our own. The first rubric in the office of Private Baptism, like our own in the time of Edward VI., directs "them that be present" to baptize the child, and adds "Quod cum fecerint, *ne dubitent* infantem suum *verè* baptizatum, peccatis ablutum, in Christo renatum, et filium hæredemque Dei factum esse." Can any stronger authority be adduced to show the opinion of Melancthon?

My learned friend, I think, said that cases of necessity might render some things valid which otherwise would be invalid; and

\* Bampton Lectures, 3rd ed. p. 379.

he referred to notes of wills, which under the old law respecting wills were allowed to have effect. If necessity can render a rite valid, notwithstanding the omission of some particular, that particular cannot be an essential part of the rite. Will my learned friend, then, contend that the omission, without necessity, of some matters not absolutely essential in the services of the Church, will render the services themselves invalid? Does not my learned friend know, that at the administration of the Sacrament of the Lord's Supper, it is required that the minister himself, with his own hands, shall place the elements of the sacrament on the communion table, and that this shall be done at a particular period of the service? Is not my learned friend also aware that this is not the practice followed, but that this duty is ordinarily performed by the clerk, and without any necessity? This is, doubtless, a matter of irregularity; but will my learned friends contend that the blessed influence of the Holy Sacrament is thereby destroyed with regard to its recipients. My learned friends will not contend that the irregularity of the administrator will prevent the reception of benefit by the person to whom the Lord's Supper is administered. Shall we, then, say that, however blameable, and culpable, and punishable, may be the persons who administer lay baptism, the recipients cannot derive from such administration the benefits of baptism? That is the question. It is not whether the administrators do right, but whether the recipient of lay baptism is to forfeit the privileges connected with valid baptism.

My learned friend has referred also to the analogy of marriage to baptism; and he has said that, if I had read the opinion of Dr. Waterland, he wonders I should have argued the question as I have done. Waterland's argument, if I remember right, is, if the maxim "*quod fieri non debet factum valet*" is sound, why are not marriages within the prohibited degrees good? My answer would have been, because the law not only declares such marriages irregular and unlawful, but expressly forbids the contract, and distinctly declares it to be null and void. Waterland, however, says, because there is an error in essentials, and not in circumstantialis. Kelsall, very truly, as it appears to me, answers,—The distinction is good; but it is not yet shown that a minister is essential to baptism. I presume not to say whether a lawful minister ought or ought not to be considered essential. All I contend is, that the Church of England

does not so consider. One fact, however, as respects marriage. By the Marriage Act, 4 Geo. IV. c. 76, s. 2, marriages are required to be performed in the church where the banns are published, "and in no other place whatsoever;" yet still, if the ceremony is performed in another church, the marriage is valid. It is true, the same act forbids any evidence as to the residence of the parties to be received in any suit touching the validity of the marriage.

Dr. *Phillimore*.—Marriage is not a sacrament.

Dr. *Nicholl*.—Marriage was a sacrament in the Church of Rome, and was considered of equal importance with baptism, or the Lord's supper.

I am sorry to have troubled the Court at such length, but before I sit down I must refer to a short passage in Dean Comber, which was adverted to by my learned friend, but which, quoting from a pamphlet, and not from the work itself, he did not give with perfect accuracy. Dean Comber, as I showed in my former argument, is a strong authority in our favour, as establishing that baptism administered even by a heretic, if performed with water, and in the name of the Father, and of the Son, and of the Holy Ghost, is valid. In his "Companion to the Temple," Dean Comber, in the Introduction, part iv. says, "First, the persons capable of Christian " burial are only those within the pale of the Church, for the rubric " excludes all others from this privilege, which is agreeable to the " sense of all nations. . . . . None have been so justly and so uni- " versally deprived of that natural right which all men seem to have " in a grave as those who break that great law of self-preservation " by laying violent hands on themselves. . . . . To these (suicides) " are to be added all that die under the sentence of excommunication. " . . . . Finally, this office is also denied to infants not yet admitted " into the Church by baptism, as well by the aforesaid Council of " Bracara as by our own rubric. . . . . All other persons that die " in the communion of the visible Church are capable of these rites " of Christian burial, according to the rules and practice both of " the primitive and the present ages."—The visible Church—that is, the Catholic—the Christian Universal Church—the whole body of the faithful. I say then, interpret Dean Comber by himself. He says that baptism by laymen, nay even by heretics, in the name of the Father, and of the Son, and of the Holy Ghost, is not to be iterated. He says also, that persons who are *felo de se*, or excom-

municate, or who have not been received by baptism into the visible Church of Christ, are those only who are not entitled to the rites of Christian burial. All others are entitled to those rites. It is evidently the opinion of Dean Comber that persons who have been baptized by heretics or schismatics, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, are admitted into the visible Church of Christ; and consequently entitled to Christian burial.

A great deal has been said with respect to the sixty-ninth canon, which imposes punishment upon a minister who shall delay to christen a child when required so to do, and such child should consequently die unbaptized. The rubric required that, as a matter of order and regularity, private baptism should be administered by a lawful minister. Any person, even though he believed in the validity of lay baptism, would naturally prefer that baptism should be administered to his child by a lawful minister. Others might feel scruples as to lay baptism, and the Church therefore required that the minister, whose duty it was to administer baptism, should be compelled to attend for its performance; and accordingly, the canon censures the minister who delays to perform his duty; it anticipates the possibility that the child might die unbaptized because the parents delayed baptizing it themselves, in the hope that the minister might arrive in time; but the canon does not infer that baptism administered by a person other than a lawful minister is invalid.

I should have wished to have gone into the arguments of my learned friends with respect to the twenty-third Article, and the Ordination Service, but time will not permit. The twenty-third Article, when it declares that "It is not lawful for any man to take "upon him *the office* of public preaching, or ministering the sacraments," means that he is not to assume to himself the character of an officer or minister of the Church for that purpose. The Ordination Service states that "It is evident unto all men, diligently "reading the Holy Scripture and ancient authors, that from the "Apostles' time there have been these orders of ministers in "Christ's Church—bishops, priests, and deacons: which offices" (that is, the actual office and character of a bishop, &c.) "were "evermore had in such reverend estimation, that no man might "presume to execute any of them"—(that is, any of those offices—

that is, that no man might presume to assume the character and office either of a bishop, a priest, or deacon)—“ except he were first “ called, tried, examined, and known to have such qualities as are “ requisite for the same ; and also by public prayer, with imposition “ of hands, were approved and admitted thereunto by lawful au- “ thority.” We now come to the description of the person who is to be accounted a lawful minister, or to be an actual minister. “ And, therefore, to the intent that these orders may be continued “ and reverently used and esteemed, in the United Church of Eng- “ land and Ireland, no man shall be accounted or taken to be a “ lawful bishop, priest, or deacon in the United Church of England “ and Ireland, or suffered to execute any of the said functions, “ except he be called, tried, examined, and admitted thereunto, “ according to the form hereafter following, or hath had formerly “ episcopal consecration or ordination.” That is, first, no man shall be esteemed to be regularly and *de jure* a bishop, priest, or deacon, in the United Church of England and Ireland, except he be called and admitted thereunto, as therein required : Secondly, that not only shall no man, unless so called, be esteemed a bishop, priest, or deacon *de jure*, but he shall not be allowed *de facto* to occupy the post and station of a bishop, priest, or deacon, in the Church of England. It has been represented that the meaning of this is, that no man shall execute any of the functions which belong to a bishop, priest, or deacon. If the Court looks at the Preface carefully and closely, it will see that such is not the real meaning of the passage. It means he shall not actually be a bishop ; he shall neither be esteemed *de jure* a bishop, nor shall he be *de facto* a bishop. It is not said, “ He shall not execute any of the functions “ of the said offices,” but “ He shall not execute any of the said “ functions,” *i. e.* he shall not be a bishop, priest, or deacon. It is difficult to explain this clearly ; but the Court will, on critical examination of the passage, see the meaning is that a person shall not be capable of being *de jure* or *de facto* a bishop, except he be called, tried, examined, &c. ; and accordingly under this and the analogous words in the body of the Act of Uniformity, all persons not episcopally ordained ceased to be priests and deacons of the Church of England, and 2000 beneficed clerks, either from that circumstance, or from declining to read and declare their assent to the

Book of Common Prayer, were actually expelled from, or gave up, their benefices. "About 2000 of the clergy," says Hume, "in one day relinquished their cures."

I beg to apologize for having troubled the Court at such length. I was desirous of noticing those points in the arguments of my learned friends, which appeared to me the most material; but I must remind the Court again that they have carefully avoided that part of the history, and of the law and practice of the Church, which had the most stringent bearing upon the case. They have not only done this in their arguments; but in their plea they attempted, with great astuteness and cunning, to draw the attention of the Court from what had been the ancient and long established practice of the Church, by quietly admitting it. We have, however, drawn the attention of the Court to the early practice and law of the Church; and it is for the Court, knowing what the law was previous to 1604, to say whether that law has been since changed. We submit that it has not; and we contend that those who were previously to 1603 entitled to Christian burial, are now entitled to the same rites.

Sir HERBERT JENNER.—In this case the arguments have not occupied more time than the importance of the question led me to anticipate; nor, long as they have been, do I consider that the time of the Court has been uselessly or unnecessarily engaged. The Court is, indeed, greatly obliged to the learned counsel who have argued on either side, for the information they have afforded the Court. The case is one of great importance; and it assumes still further importance from coming after the decision in the case of Kemp and Wickes, which was for many years considered as having settled the law on this subject. The Court is not aware whether, in the case of Kemp and Wickes, the arguments extended to so wide a range as in the present instance. Whatever deference I may entertain for the decision of my learned predecessor in this chair, it will be my duty to consider and weigh for myself the arguments which have now been offered to the Court, and form my own opinion upon them. The alterations made in the law of the Church before and subsequently to the Reformation, should, I think, be carefully considered together; and the Court will, there-

fore, be under the necessity of taking some time to consider its judgment. I must request to be furnished with copies of the manuscript quotations which have been referred to; and with extracts from those books which can only be procured at the British Museum, or which are not within the reach of the Court—for instance, the "Annals of Queen Anne."

SATURDAY, 8th MAY.

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JUDGMENT.

Sir HERBERT JENNER.

This case was argued at great length and with great learning and ability in the course of the last Term, and numerous authorities were referred to by the Counsel on either side. The case itself is one of extreme importance, and the Court was therefore anxious, before pronouncing its opinion, to examine those authorities, and to compare them with the arguments adduced on the one side or the other.

This Court has no original jurisdiction in matters of this description. It is the general Appellate Court of the province, and it is only when requested to take cognizance of cases properly belonging to the Diocesan Courts that this Court entertains such suits. This case accordingly comes before the Court by letters of request from the Chancellor of the Diocese of Lincoln. It is a criminal proceeding, technically described as The Office of the Judge promoted by Mr. Frederick George Mastin, a parishioner and inhabitant of the parish of Gedney, in the county and diocese of Lincoln, against the Reverend Thomas Sweet Escott, the vicar of that parish. The offence imputed is, that Mr. Escott refused to bury the infant child of Thomas and Sarah Cliff, who were inhabitants of the parish of Gedney, convenient notice according to the canon having been given to him for that purpose.

The usual proceedings have been taken in this Court: the citation was returned; an appearance was given for the party cited; articles were given in; and upon those articles eight witnesses have been examined. On behalf of Mr. Escott, an allegation was given in, pleading the substance of his defence. Upon that allegation no witnesses have been examined. Indeed the allegation itself propounded rather matters of law than of fact, and referred in proof thereof to the laws themselves. They required no evidence in support of them; and the only averment as to which there was any necessity of adducing proof, viz., that the gentleman by whom the

office of baptism in this case was administered was not an episcopally ordained minister, which was admitted in acts of Court.

Having thus stated the general nature of the proceedings, I will in the first instance refer to an observation very properly made by the counsel for Mr. Escott, as to the motives upon which the refusal to bury in the present instance was founded.

In the year 1809, a case of a similar description to this, almost identical in its circumstances, was brought before the Court for the judicial determination of my learned predecessor in this chair ; and in the course of those proceedings, articles were given in, and the discussion of the question was taken, and in point of fact the decision of the question was given upon the admission of the articles. That judgment appears to have been very generally acquiesced in, or at least no case has been brought before these courts calling it in question, or impugning the soundness of the principles upon which it was based. It might therefore have been supposed, after an acquiescence of nearly thirty years, that the point had been considered as finally settled and determined. But although that decision was generally acquiesced in ; yet it is notorious, that at the time when it was originally pronounced, there were not wanting some among the clergy who dissented from it, and who openly and in strong terms, and in no measured language, expressed their dissatisfaction with the grounds upon which it proceeded, though few, I believe, acted in opposition to it.

Of late years, however, the question has been revived, and several of the clergy, influenced no doubt by the most conscientious motives, have thought it advisable to bring the matter again forward, in order to a revision of the judgment alluded to, that, if the grounds of that judgment be found erroneous, it may be reversed, or, if correct, affirmed by the decision of the highest court in ecclesiastical matters—that of the Queen in Council, with the advice of the Judicial Committee ; and accordingly, the time for appealing from the sentence in *Kemp v. Wickes* having passed, the question has been raised anew in the present case in this Court, as the only mode of obtaining the opinion of the ultimate Court of Appeal.

In the present case the natural forum would have been that of the diocese in which the incumbent was beneficed, and where in point of fact the offence complained of was committed. But it was

not thought convenient to institute proceedings there, and consequently the Chancellor of that diocese, in the usual manner, signed letters of request to this Court as its immediate superior.

The question having been thus raised, I have no inclination nor right to find fault with the parties for determining to bring the matter to an issue. On the contrary, I think it is extremely desirable that a question of this great importance, which has produced so much excitement, and created so great an interest, should be finally set at rest : that can only be done by having recourse to the judgment of the Supreme Court of Appeal, which has jurisdiction over all the dioceses of this kingdom ; whereas the jurisdiction of this Court is confined to the province of Canterbury only, and it is extremely desirable that the practice in all the dioceses, whether in the province of Canterbury or in the province of York, should be placed upon one and the same footing, that there should not be one practice prevailing in one diocese, and a different practice in another.

The case of *Kemp v. Wickes* was also a single decision. It was a case *prima impressionis*, and therefore that judgment, however able, and however elaborate, could hardly be considered as conclusive and of binding effect, like a series of decisions by the Courts of Law upon the same identical point. The Court, then, feels that no apology is due on behalf of Mr. Escott for having again brought the question forward for judicial determination, believing, as I have no doubt he conscientiously does, that the ordinances of the Church forbid him to perform the burial service over a child circumstanced as was the child mentioned in the present proceedings. No apology is due for seeking to obtain a final and conclusive adjudication upon this question. I think, therefore, that this question has been very properly raised upon the present occasion ; and it is due to the parties to state, that there does not appear to have been, either on the one side or upon the other, any wish to excite irritation further than that which naturally arises from the agitation of such a point.

This case, also, is of great importance to the body to which the father and mother of this infant child belong, involving much more serious consequences to them than the mere question whether a child baptized by one of their own body is entitled to the offices of

the Church at the time of burial. It is to them, I say, a matter of great importance; for if the Court should be of opinion that Mr. Escott was justified in his refusal to bury this child, on the ground that it had not received baptism at the hands of a lawful minister, it will almost amount to a declaration, that in the eye of the law the great body of Dissenters, who have mostly been so baptized, are not to be considered as Christians, as members of the Church of Christ. It is of the highest importance to them to know their real state and condition; for it is no light matter, as is expressed by Bishop Fleetwood, for a Christian man, living in the midst of a Christian country, to know whether he is to be considered as a Christian or not. Therefore I dismiss this part of the case, with the observation that I am extremely glad (except on one consideration personal to myself) that this question has been raised, and that it will probably receive the adjudication of the ultimate Court of Appeal.

I may here also, before I proceed to consider the merits of the case, notice a preliminary objection taken to the competency of the promoter to originate these proceedings. This objection was founded upon the answer given to an interrogatory addressed to several witnesses examined upon the articles. The interrogatory was, " Bearing in mind the evidence you have already given in this cause, and the oath you have taken, do you not admit that the Wesleyans do in fact, as a body, affirm that it is lawful for ministers and lay persons to join together and make rules, orders, and constitutions in causes ecclesiastical, without the Queen's authority, and submit themselves to be ruled thereby? If you do not admit this absolutely and without qualification, will you take upon yourself conscientiously to deny that they do this in the ordinary sense of the above words?" And in order to fix Mr. Mastin, the promoter, as a member of the Wesleyan body, a further interrogatory was addressed to the witnesses, by which inquiry was made as to the profession, business, and station in life of the promoter, inquiring whether he was not a Wesleyan, and whether he does not now, at the time of administering the interrogatory, or has ever borne any and what office in the Wesleyan body.

Among the witnesses to whom this interrogatory has been addressed, one of them, Mr. Balle, the gentleman by whom the office of baptism was performed to this infant, has answered the question

in the terms of the interrogatory. Mr. Bond, who is also a minister of that class, also answered it in the affirmative; but Mr. Balley adds this to his deposition upon this interrogatory; he says, "I "certainly cannot take upon myself conscientiously to deny that "the Wesleyans do this in the ordinary sense of the above words, "although at the same time they profess to submit themselves to "the Queen's authority implicitly." That is the qualification which Mr. Balley makes in his answer to this interrogatory, admitting, in the terms of the interrogatory, that they do affirm the tenets there expressed; but that, notwithstanding they submit themselves to certain rules and regulations not imposed by the Queen's authority, they nevertheless do admit her authority most implicitly. It has been contended upon this answer, that Mr. Mastin, as a Wesleyan, must be taken to support this doctrine, and that, as such, he falls within the provisions of the 12th canon of 1603, which declares, that persons who do so affirm are excommunicated *ipso facto*, and are not to be restored but by the bishop-or by the archbishop after their repentance and public revocation of their wicked errors; and that in these Courts it is not necessary that, in a case of excommunication *ipso facto*, there should be a declaratory sentence, for that these Courts may take notice of the excommunication, although no such sentence may have been given; and it was contended that, as an excommunicated person, Mr. Mastin was disqualified from being promoter of the office of the judge, and consequently that all the proceedings in the present case were mere nullities. When this objection was first taken, I felt very considerable surprise; for having practised for a great number of years in these Courts, it was the first time that I had heard that a person, who was declared by a canon to be *ipso facto* excommunicated, was (with, I should say, one exception, of a case to which I shall presently advert) disqualified from suing in these Courts; and in the course of my practice in these Courts, I have known cases in which Dissenters of all classes have been suitors in these Courts, in matrimonial cases, in suits for restitution of conjugal rights, in cases of divorce, in cases of defamation, in cases of brawling, and I never heard the objection stated, nor ever knew that the objection had been raised, with the exception of one class of cases which has been adverted to, and one of them mentioned by name by Dr. Harding, who argued in support of this objection.

If this objection were to be upheld, it would have a most extraordinary effect ; the whole class of Wesleyans would be disqualified from suing in these courts in consequence of this canon of 1603, declaring that persons who maintain the doctrines there stated are *ipso facto* excommunicated. The Court would be certainly most cautious in expressing an opinion that a canon of such a description could have such an operation ; but in support of the objection so taken, reference was made to the case of Scrimshire v. Scrimshire, reported in page 395 of the second volume of Dr. Haggard's Consistorial Reports. In that case Sir Edward Simpson said, that " it was the constant practice in the Ecclesiastical Courts to repel " the testimony of persons present at clandestine marriages till they " have been absolved. Persons present at such marriages are ex- " communicated *ipso facto* ; and in our Courts it is not thought " necessary to have a sentence declaratory of an excommunication " *ipso facto* ; for the Court can *ex officio* take notice of it ;" and he referred to the case of Colli, which had been so determined by Dr. Andrew, in the Consistorial Court of London, in 1751, the date of Sir Edward Simpson's decision being 1752.

The case of Scrimshire v. Scrimshire was a suit brought by the wife against the husband for restitution of conjugal rights, and was founded upon a secret and clandestine marriage. The observation of Sir Edward Simpson occurred in speaking of the objection raised to the sufficiency of the proof, the witnesses to the marriage being, it was contended, incompetent to give evidence, as they were *ipso facto* excommunicate. In that particular case it seems that the incompetency of the witnesses had been removed by special act of grace ; whether that act of grace extended to Mrs. Scrimshire as well as to the witnesses, does not appear. Nothing was said as to her competency to bring the suit. Sir Edward Simpson certainly there said that but for that act of grace, or by reason of absolution, before they gave their evidence, their testimony could not have been received ; and it was accompanied with the observation, that in these Courts a declaratory sentence was not necessary in cases where the parties were *ipso facto* excommunicated. However, about two years afterwards, 17th June, 1754, there occurred in the Court of Peculiars, before Sir George Lee, then Dean of the Arches, a case of a similar description, being also a case for restitution of conjugal rights, founded upon a marriage

in the Fleet, which was therefore a secret and clandestine marriage. That was the case of *Grant v. Grant*, reported in 1st Lee, 592. In the course of the proceedings, Dr. Collier, who was counsel for the husband, objected that the woman, by her own showing, was, by the constitution in Lyndwood, *De cland. despōns.*, under sentence of excommunication for being clandestinely married, and was not absolved, and therefore could not sue; and that the witnesses who were present at the clandestine marriage, and were therefore *ipso facto* excommunicated, had been, in order to render them competent to give their testimony, absolved in the Court of Peculiars, where the suit was pending, and not by the Chancellor of London, within whose jurisdiction the offence had been committed. He cites the before-mentioned case of *Colli*, in which Dr. Andrew had refused to pronounce his sentence till Mrs. Colli had been absolved. Thereupon Dr. Harris, who was counsel for Mrs. Grant, stated that Mrs. Grant was ready in Court to pray absolution as Mrs. Colli had done. Sir George Lee said that the case of *Colli* was new; that it had never been the practice of the Court of Peculiars to absolve a party to enable him or her to sue, and that he believed that it had not been the practice of the Consistory, except in that one instance. He says, "I was counsel in that cause, and was extremely dissatisfied with that judgment at the time when it was given by Dr. Andrew, and saw no reason to alter my opinion: that I thought the practice, by interpretation upon that constitution, had gone full far enough in disabling witnesses upon an excommunication *ipso facto*, without a denunciation, and that I would not extend it further, and introduce a new practice, by disabling a party to sue, and therefore over-ruled the objection; and as to the witnesses, wherever the offence was committed, they must be absolved *ad testificandum* in that Court where they were produced as witnesses."

Now, therefore, it should seem, that although under that particular canon witnesses were held to be disqualified and rendered incompetent to give their testimony, who had been present at a clandestine marriage, yet Sir George Lee would not hold, and it never has been the practice to consider, that the party in the cause ought to be absolved for the purpose of instituting a suit in the Ecclesiastical Court. One can understand with respect to witnesses why a declaratory sentence was unnecessary; because the very first

moment of their appearing to give evidence of the fact of marriage they would prove their presence, which would convict them, on their own showing, of the offence to which the penalty of excommunication *ipso facto* was attached. But with regard to the party who was proceeding to enforce her rights, Sir George Lee held that excommunication *ipso facto*, without denunciation, was not sufficient.

The case, therefore, of *Grant v. Grant* over-ruled the single case, as Sir George Lee considered it, of *Colli v. Colli*, in the Consistory Court; and so strongly did Sir George Lee feel upon the point, that he would not permit the party to come forward to be absolved, although she was ready in Court, and offered herself for that purpose. In no other case does the question appear again to have been raised; and very shortly after the decision of *Grant v. Grant*, the Marriage Act passed, which rendered all secret and clandestine marriages utterly null and void, and required all marriages to be solemnized *in facie ecclesiae*. The case then of *Grant v. Grant* appears decisive as to the practice of the Court at that time; and it would certainly be somewhat strange, after the Toleration Acts, that the Court should pronounce that a party who held the doctrine imputed to him by this interrogatory, and every other individual of the same class and holding the same doctrine, were deprived, as persons excommunicate *ipso facto*, of the right of suing in the Ecclesiastical Courts.

The last act which passed with respect to ecclesiastical censure by excommunication, the 53rd of George III. c. 127, appears to me to be conclusive upon that point; for although the sentence of excommunication, as an ecclesiastical censure, is not abolished, yet no civil disabilities are to be incurred by a declaratory sentence or denunciation. The party, instead of being declared to be subject to all the pains and penalties, and to all the disabilities, which formerly attached to an excommunicated person, is now to be imprisoned for such time as the Court may direct, under the particular circumstances of the case; and it is expressly enacted by that statute, that no civil disability shall be incurred thereby; and certainly it would be incurring a civil disability, if a person were not allowed to sue in these Courts. But it must also be recollected, that this is not a case in which the party promoting is suing for a right of his own. His own rights may to a certain extent be involved in the question; but he is only promoting the office of the judge in a

suit in which the public are chiefly interested, although private interests may to some degree be concerned.

But again, I think it may well be doubted whether the 12th canon was directed against such persons as the Wesleyan Methodists: that body, of course, was not in existence at that time. It seems to me that this canon was directed against persons of a very different description—persons who were much more sturdy opponents to the discipline and government of the Church than are the Wesleyans as a body. It seems to me, that the class of persons against whom this canon was directed, were those of whom Cartwright (whose name was repeatedly mentioned in the course of these proceedings) was at the head—who were strong opponents to the government and discipline of the Church, and of whom King James the First, about the time at which these canons were passed, says, “ I have “ learned of what cut they have been, who preaching before me “ since my coming into England, passed over in silence my being “ supreme governor in causes ecclesiastical.” I am reading this from a note to Cardwell’s Conferences, at page 136. Those are the kind of persons against whom the canon was directed; those who denied the King’s supremacy. It was argued upon the answer given by the witnesses to the interrogatory in question, that the Queen’s supremacy was necessarily denied, from the manner in which these persons submitted themselves to be governed by their own laws. I confess, however, it would be very difficult to persuade me, from that answer, that Mr. Mastin was to be convicted (if I may so express myself) of holding those tenets which are imputed by the questions, and against which the canon to which reference is made was directed.

I am therefore, upon these grounds, clearly of opinion that Mr. Mastin, as the prosecutor in this case for the interest of the public, not for his own private individual interest, is competent to promote the office of the judge, and that consequently the Court is bound to proceed to the consideration of the merits of the case.

The facts of the case are pretty much admitted on all hands. The articles plead, first, that Mr. Escott, who was the party proceeded against, was the incumbent of the parish of Gedney, in the county and diocese of Lincoln; next, that he was bound to obey the laws, canons, and constitutions ecclesiastical of this realm.

The 4th article sets forth the 68th canon of 1603, upon which

the present proceeding is founded. That canon is entitled "Ministers not to refuse to christen or bury," and ordains that "No ministers shall refuse or delay to christen any child according to the form of the Book of Common Prayer that is brought to church to him upon Sundays or Holydays to be christened, or to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, in such manner and form as is prescribed in the Book of Common Prayer; and if he shall refuse to christen the one or bury the other, except the party deceased were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime, and no man able to testify of his repentance, he shall be suspended by the bishop of the diocese from his ministry by the space of three months."

The 5th article pleads, "That notwithstanding this canon Mr. Escott had upon two several occasions, the 16th and 17th of December, expressed his determination not to bury in the churchyard of Gedney the infant daughter of Thomas Cliff and Sarah Cliff, his parishioners, if brought for burial to the churchyard; and that in pursuance of such declared determination, the said Thomas Sweet Escott, on the 17th day of the said month of December, or on some other day, did, contrary to his duty, refuse to bury in the churchyard of Gedney the corpse of Elizabeth Ann Cliff which was then brought to the churchyard, convenient warning having been given for that purpose."

The 6th article pleads, "That the child died within the parish, consequently that that was the place in which it was entitled to be interred—that it was the daughter of Thomas Cliff and Sarah his wife, who were protestants, of the class of people commonly called or known as Wesleyan Methodists, and who had been in the habit of frequenting for some time previous to the 17th of December a chapel or place of religious worship established for that class, which was within the parish of Gedney—that the child had been baptized on or about the 1st day of October in that year, 1839, according to the rite or form of baptism generally received and observed among the said class of people known as Wesleyan Methodists, that is to say (for this is the important point), that the child was baptized with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Balley, a minister, preacher or teacher of the said class of people commonly called or known as

Wesleyan Methodists—that of the aforesaid fact of baptism Mr. Escott was informed, both on the 16th of December, 1839, by the father of the child, and on the 17th of that month by Mr. Bond, also a minister of the Wesleyan Methodists, who urged and entreated him upon those occasions to consent to bury the corpse, and that he was at the time of his refusal to bury the corpse sufficiently apprised and aware of the fact of baptism—that upon those occasions, as well as at the time when the child was brought to the churchyard for the purpose of interment upon the said 17th of December, application was made for the burial thereof in the manner described by the Book of Common Prayer, and that Mr. Escott refused to comply with such entreaties."

The 7th and 8th are merely general articles, stating that the offence is one which subjects Mr. Escott to ecclesiastical proceedings, and that by virtue of the letters of request he is subject to the jurisdiction of this Court.

Such are the articles upon which the present proceeding is founded: and all that was necessary for the purpose of these articles was to prove that this child was baptized by a Wesleyan minister—that Mr. Escott, the minister of the parish within which the child was born and died, was informed of that fact—that he was informed that they meant to bring the child for burial upon the day following that upon which the notice was given,—and that being fully apprised of that fact he refused to attend, and that the child was accordingly interred without the burial service being read over it.

All the facts thus stated in the articles are either admitted in acts of Court, or fully proved by witnesses. I do not mean to refer in detail to the evidence. It is extremely desirable that all angry feeling should be laid aside in the consideration of this case, and that the question should receive its determination upon the true and proper ground, namely, whether a child who had received the outward and visible form of baptism (that is, had been sprinkled with water in the name of the Father, and of the Son, and of the Holy Ghost) by a dissenting minister, not being a lawful minister of the Church of England, nor episcopally ordained, as it is admitted was the case with respect to Mr. Balley who administered the rite, is to be considered as unbaptized, and not entitled to have the burial service read at its interment, or whether the refusal to read the

service over the child so baptized does or does not bring the party so refusing within the provisions of the canon.

I have already said that the allegation of Mr. Escott propounds matters of law rather than of fact. The 1st article of his allegation, after reciting the first of the promoter's articles, pleads, that Mr. Escott, in forming the determination of refusing to read the burial service at the interment of the corpse of Elizabeth Ann Cliff in the churchyard of the parish of Gedney, was so far from acting in contempt of the laws, canons, and constitutions of the Church of England, that he acted in obedience to, and in conformity with, the laws and constitutions to which he had bound himself when he became an ordained minister of the Church of England.

The 2nd article pleads, " That in the preface to the form and manner of making deacons, as established by the Liturgy of the Church of England, it is expressly set forth and provided, ' That ' none shall be accounted or taken to be a lawful bishop, priest, or ' deacon in the United Church of England and Ireland, or sufficient ' to execute any of the said functions, except he be called, tried, ' examined, and admitted thereunto according to the form hereafter ' following, or hath had formerly episcopal consecration or ordina- ' tion.' " Therefore putting in issue the fact of the validity of the administration of the baptism of this child.

The 3rd article recites the 6th article, which I have read, in which it was alleged that the child had received baptism according to the Wesleyan rite by a minister of that class of people, and it pleads " That such minister, teacher, or preacher was unordained, and that any rite or form of baptism performed by any such minister, teacher, or preacher is to all intents and purposes null and void in the sense of, and according to, the articles, canons, and rubric of the Church of England."

The 4th article pleads, " That from and after the Conferences holden at Hampton Court in the year of our Lord 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives under licence from the bishops of their respective dioceses, and which practice had been up to that period tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm, assembled at the said Conferences of Hampton Court as

aforesaid ; and in order to give effect and force to such repudiation, King James I. directed and caused an alteration to be made accordingly in the Liturgy of the Church of England." And Mr. Escott alleges and undertakes to prove that from that period, namely, the period of the Hampton Court Conferences of 1603, to the present day, the Liturgy of the Church of England has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary. That is the proposition which Mr. Escott undertakes by his counsel to establish.

The 5th article sets forth the Liturgy of 1595 (that is, the Liturgy in the time of Queen Elizabeth), in order to show the variations between the Liturgy of 1595 and those which are pleaded in the subsequent article, and in order to show the alterations which had taken place in the opinions of the heads of the Church assembled together to consider the revision of the Liturgy in 1603. And it then sets forth the rubric of 1595 as to the baptism of persons in private houses, " First, let them that be present call upon God for " his grace and say the Lord's Prayer, if the time will suffer, and " then one of them shall name the child and dip him in water, or " pour water upon him, saying these words, ' I baptize thee in the " name of the Father, and of the Son, and of the Holy Ghost,' " And it pleads that this book is now remaining in the British Museum.

The 6th sets forth the Liturgy printed in 1606, in which the rubric is as follows:—" First, let the lawful minister and them that " be present call upon God for his grace and say the Lord's Prayer, " if the time will suffer; and then the child being named by some " one that is present, the said lawful minister shall dip it in water " or pour water upon it, saying these words, ' I baptize thee in the " name of the Father, and of the Son, and of the Holy Ghost,' " and it pleads that this book also is now remaining in the British Museum.

The difference between those two Liturgies consists in this, that whereas by the first, that of 1595, one of the persons present was to call upon God for his grace, and, if time would permit, to say the Lord's Prayer, and then one of them was to dip the child or pour water upon it, and to pronounce the words, " I baptize thee " in the name of the Father, and of the Son, and of the Holy " Ghost;" by the Liturgy printed in 1606 it is directed, that that

should be done by the lawful minister. That is the distinction between those two Liturgies as set forth in this allegation.

The next article, the 7th, sets forth the rubric to the Order for the Burial of the Dead, which was confirmed by act of parliament in the 13th and 14th of Charles the Second, and which enjoins, that such office is not to be used for any that die unbaptized or excommunicated, or have laid violent hands upon themselves. That is the law now in force.

The 8th recites that article on behalf of the promoter which set forth the 68th canon of 1603, and in contradiction, or rather, I may say, in explanation of that canon, it alleges that that " canon can only be taken and construed in conjunction with, and in reference to, the other constitutions and canons promulgated in the same code." And it goes on to plead, " that by the 9th of those canons, entitled ' Authors of Schism in the Church of England censured,' it is ordained that ' Whosoever shall hereafter separate themselves ' from the Communion of Saints, as it is approved by the Apostles' ' rules in the Church of England, and combine themselves together ' in a new brotherhood, accounting the Christians who are conform- ' able to the doctrine, government, rites and ceremonies of the Church ' of England to be profane and unmeet for them to join with in ' Christian profession, let them be excommunicated *ipso facto* and ' not restored but by the archbishop after their repentance and ' public revocation of such their wicked errors.' " And it further refers to the 12th canon, entitled " Maintainers of Constitutions " made in Conventicles censured," and recites those words which are embodied in the 14th interrogatory addressed to the witnesses, with a view to show that they held those tenets and therefore were under sentence of excommunication *ipso facto*. It is not now necessary to repeat those words, as they have already been read by the Court. It then refers to the 5th canon, entitled " Impugners of " the Articles of Religion established in the Church of England " censured," in which it is ordained that " Whosoever shall here- " after affirm that any of the Nine and Thirty Articles agreed upon " by the archbishop and bishops of both provinces, and the whole " clergy, in the Convocation holden at London in the year of our " Lord 1562, for avoiding diversities of opinions and for the esta- " blishing of consent touching true religion, are in any part super- " stitious or erroneous, or such as they may not with a good con-

“ science subscribe unto, let him be excommunicated *ipso facto* and “ not restored but only by the archbishop after his repentance and “ public revocation of such his wicked errors.”

The 9th pleads the 23rd Article of the Thirty-Nine Articles, by which it is decreed that “ It is not lawful for any man to take upon “ him the office of public preaching or ministering the Sacraments “ in the congregation before he be lawfully called and sent to execute “ the same, and those we ought to judge lawfully called and sent “ which be chosen and called to this work by men who have public “ authority given unto them in the congregation to call and send “ ministers into the Lord’s Vineyard.”

The 10th refers to the 25th of those Articles in 1562, which ordained as follows, “ There are two Sacraments ordained of Christ “ our Lord in the Gospel, that is to say, Baptism and the Supper of “ the Lord.” And it alleges that Mr. Balley, referred to in the 6th article on behalf of the promoter, “ is not a lawful minister and never hath received episcopal ordination or consecration, and that by reason of the premises Elizabeth Ann Cliff was not in fact baptized by the said Elisha Balley, but the said pretended baptism, if performed as therein alleged, was altogether invalid and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions, and rubric herein-before more especially propounded and set forth.”

The 11th article was rejected by the Court for these reasons, that it set forth the discipline which Mr. Wesley imposed upon his followers, and in which he strongly repudiated the notion, that by sending them forth to preach they had authority to administer the Sacraments of Baptism and the Lord’s Supper. The Court thought that by no possibility could this enter into the consideration of the question, as to the validity or invalidity of the baptism which this child had received. That what Mr. Wesley might have enjoined upon his followers to do, or to leave undone, could have no effect upon the decision of this question, and that such averments would involve the necessity of allowing the other side to set forth that which is stated in the answer to the interrogatory addressed to one of the witnesses, that at a later period of his life Mr. Wesley changed his opinion, and that either the great increase in number of his followers, or some other cause, rendered it necessary that he should depart from that rule which he had prescribed to them, and allow

them to perform the office of Baptism and to administer the Sacra-  
ment of the Lord's Supper. But in fact, whatever their discipline  
might have been, whatever orders or rules might have been issued  
by Mr. Wesley for their government, that could not affect the de-  
termination of the Court upon the question which, as I have already  
stated, it is called upon to decide, viz. whether a child that had  
received the outward and visible form of baptism—that is, which  
had been, as in this case, sprinkled with water in the name of the  
Father, and of the Son, and of the Holy Ghost by a Dissenting  
minister, that minister not being an ordained minister of the Church  
of England, nor episcopally ordained, as the fact is admitted to be  
with respect to Mr. Balley—whether that child so sprinkled was to  
be considered as within the terms of the rubric unbaptized, and not  
entitled to have the burial service read at its interment—or whether  
the refusal to bury that child and to read the service over it did or  
did not bring the party who so refused within the provisions of the  
68th canon.

That canon expressly declares, that ministers who shall refuse  
to bury a corpse that is brought for that purpose, convenient notice  
having been given, shall be subject to the penalty of three months  
suspension, unless in the case of a person who had been denounced  
excommunicated *majori excommunicatione*. This, however, is not  
the only case in which a clergyman may refuse to bury; because by  
the rubric of 1661, which is the rule by which this Court must now  
be governed as the rule of the Church, the Burial Service is not to be  
read over persons who die unbaptized or excommunicated, or who  
have laid violent hands upon themselves. The rubric of 1661 in-  
cludes the disqualification mentioned in the canon and adds these other  
two disqualifications, namely, that of dying unbaptized or of being  
*felo de se*. These excepted cases being in derogation of a general  
right are to be construed strictly. The object of the Church and  
of the Legislature, which confirmed the rubric, must have been to  
exclude from the offices of the Church all those who had never been  
admitted into it by baptism, those who having been once admitted  
into it had for some grievous offence been excluded from it, and,  
thirdly, those who, dying in the commission of mortal sin, had by  
their own act renounced the privileges of Christianity; the prin-  
ciple applicable to these three classes of persons being, that this  
service was not to be performed over those who were not at the

time of their death members of the Church of Christ. Such I take to be the sum and substance of the disqualifications which are mentioned in the canon and in the rubric.

The question, then, may now be assumed to be the validity or invalidity of a baptism administered by a person in the situation in which Mr. Balley stood at the time this child was baptized; whether a baptism so administered would be acknowledged by the Church (I mean acknowledged as sufficient to remove the disqualification mentioned in the rubric); whether, in point of fact, this child was or was not "unbaptized;" for it is obvious that the child could not fall under the class of persons who were excommunicated, nor under that third class of persons who had laid violent hands upon themselves. In short, the question which the Court has to determine is, whether the term used in the rubric, of persons dying unbaptized, is to be applied only in cases where there has been a total absence of the rite, or whether it is to be applied in cases where there has been a want of qualification in the person by whom it was administered.

The first inquiry, then, is, what is essential to the administration of this sacrament. It is admitted on all hands, that no baptism is valid unless the matter and the form of words prescribed at the institution of the sacrament are observed and used, that is, that the child shall be immersed in or sprinkled with water, in the name of the Father, and of the Son, and of the Holy Ghost. That form was used with reference to this child, and therefore so far those things which on all hands are admitted to be essential to the validity of baptism, were duly complied with.

But it is contended, on behalf of Mr. Escott, that it is not enough that the outward and visible form or sign should be ministered, but that it must be administered by a person duly authorized and commissioned for that purpose; that is, since the year 1603, and more particularly since the year 1661, by an episcopally ordained minister, for that is the meaning of the words "lawful minister" mentioned in the rubric which forms the present law upon the subject; and that, in fact, the minister is a necessary part of the sacrament, so necessary, that without him the administration becomes null and void.

The question, therefore, in this case, must eventually turn upon this, whether, since the alteration in that rubric, an episcopally

ordained minister is, as contended for by Mr. Escott's counsel, absolutely necessary to the valid administration of this rite. If this be so, it will follow as a matter of course, that this prosecution must fall to the ground, and the defence set up by Mr. Escott will be completely established, namely, that in refusing to read the Burial Service over this child, he was acting in conformity with, and not in opposition to, the law of the Church of which he is a minister. On the other hand, if it shall appear that the minister is not a necessary part of the sacrament, but only of the orderly and proper administration of it, and that the sacrament itself is sufficiently administered, even when administered by uncommissioned or unauthorized hands, then Mr. Escott will have offended against the law, and will have incurred the penalty of the canon.

When I state that the question is, whether baptism administered by any other than a minister who has received episcopal ordination is valid or invalid, I entirely disclaim any intention of entering into the theological discussion of this much controverted point, which has employed the talents and pens of so many able, learned, and pious men. The decision of that question belongs not to this Court; all that it has to do is, to endeavour to ascertain whether the Church of England has expressed any decided opinion upon it, and what that opinion is; and according to that opinion to pronounce its decision. The law of the Church is that alone which this Court is called upon or is competent to administer; and by that law the Court must be governed, without indulging in speculations of its own, whether that law is founded in error or in truth.

After the admission in Mr. Escott's allegation, that the practice of lay baptism was tolerated by the Church of England down to the year 1603, it may at first sight appear superfluous to travel back to any earlier period for the purpose of ascertaining the time at which, and the extent to which, this practice had been admitted into the Church. But as the admission itself was in some degree qualified in Mr. Escott's allegation, which stated that the practice of the Church of Rome, permitting baptism by laymen and by midwives, under licence from the diocesan, had been tolerated by the Church of England down to the year 1603, and as it was strongly urged in the course of the argument, that the introduction of baptism at all by laymen and by women, was one of the corruptions of the Church of Rome, of which it was the object of the Reformation to

purge the Church, it may not be altogether useless shortly to trace its progress from the time of its introduction into the Catholic Church to the period of the Reformation, in order that we may be enabled the better to judge how much is to be charged to the corruption of the Romish Church, and whether any and what part of it has been derived from the ancient or primitive Church. "By the " custom of the primitive Church we mean (say the reformed divines "in the first proposition disputed in Westminster Abbey, in 1559) "the order most generally used in the Church for the space of 500 "years after Christ, in which times lived the most notable Fathers, "as Justin, Irenæus, Tertullian, Cyprian, Basil, Chrysostom, Hie- "rome, Ambrose, Augustine, and others."—Cardwell's Conferences, p. 56.

In order to arrive at a correct view of the present state of the law, it is necessary to see how the law stood at the time in which the alleged alterations are represented to have taken place. It was stated in the case of *Kemp v. Wickes*, and is undoubtedly true, and cannot be controverted, that "the law of the Church is to be deduced from the ancient general Canon Law, from the particular constitutions made in this country to regulate the English Church, from our own canons, from the rubric, and from any acts of parliament which may have passed upon the subject, illustrated by the writings of eminent persons." Those are the guides which this Court must take for its direction in the investigation into the former and present state of the law of the Church upon the subject of baptism, for the inquiry into the present state of the law may be very materially assisted by its former state.

It was observed in argument, that at the first institution of this sacrament, the administration of it was confined to the Apostles, and afterwards descended to their successors, the bishops of the Church, and to those who were duly commissioned by them, and that this continues to be the law down to the present time. This proposition will admit of no dispute, so far as affects the orderly and regular administration of the rite; although it is matter of dispute, and is indeed the whole subject of dispute in this case, whether the administration of it by others than persons so commissioned is or is not, within the view of the Church, a valid administration of the rite.

I need not state that the practice of the primitive Church is that

to which the Court would pay the greatest attention. Now, in the very early, if not in the earliest, ages of the Church, baptism by lay hands, in the name of the Father, Son, and Holy Ghost, was practised, and was allowed to be valid, and upon no account to be repeated.

It appears that so early at least as the end of the second or beginning of the third century, the practice had obtained to a certain extent; for Tertullian, who lived at that time, wrote upon the very subject; and reference might be made to a vast number of passages in his works, in support of the validity of lay baptism under certain circumstances. He thus expresses himself in the 17th chapter "*De Baptismo.*"— "*Dandi quidem habet jus summus sacerdos, qui est epis-*  
 " *copus. Dehinc presbyteri et diaconi non tamen sine episcopi autho-*  
 " *ritate, propter ecclesie honorem, quo salvo salva pax est. Alioquin*  
 " *etiam laicis jus est; quod enim ex aequo accipitur, ex aequo dari*  
 " *potest.*"

It has been indeed said, that the reason given by Tertullian for admitting the validity of lay baptism is so weak and unfounded as to detract from the weight to which the opinion of so learned a person would otherwise have been entitled. But his authority is not appealed to for the purpose of asserting the validity of lay baptism; but in order to show that the practice had obtained, to some extent at least, at this very early period of the Church; and as a necessary consequence, that it was not a part of the corruptions of the Romanists which had been introduced into and adopted by the Church of England.

Whether, therefore, the grounds upon which Tertullian advocated and maintained the validity of lay baptism be sustainable or not, he is at all events a most valuable witness (and has been always so considered) to the existence of the practice of lay baptism in his time.

On the other hand, St. Cyprian and Firmilian, who lived at a later period of the same century, maintained that baptism by any other than those who were duly and properly commissioned, was altogether null and void; and that persons baptized by heretical and schismatical priests, during the time of their heresy and schism, were not sufficiently baptized, and ought to be baptized again, because by their heresy and schism they had been reduced to the state, if not below the state, of laymen: for all these discussions

arose upon the point whether baptism was or was not to be repeated, it being the general, indeed universal, doctrine, according to the meaning which had been attributed to this passage in St. Paul's Epistle to the Ephesians, "one Lord, one faith, one baptism," that baptism once validly administered, was not to be repeated. St. Cyprian and Firmilian maintained that those sprinklings were null and void *ab initio*, in consequence of the heresy and schism of those by whom the rite was administered, and consequently that there was in such cases no reiteration or repetition of baptism, because, in point of fact, baptism had never been administered.

But this opinion of St. Cyprian and Firmilian was not generally adopted; it was expressly over-ruled by the Council of Arles: for it was said that the priestly character being once impressed, was indelible, and that the commission could not be revoked or lost by any acts of those to whom it had been entrusted. And therefore the opinion seems to have prevailed, that schismatical and heretical baptisms, being performed by persons who had been originally duly commissioned, were good and valid, provided the proper matter and form were used and observed.

These writers, again, are referred to only to show, that at this time the controversy upon the point continued, and not for the purpose of establishing the validity or invalidity of the administration of the rite.

A great division of opinion upon this point prevailed for a considerable time. The Eastern and Western Churches embraced different sides of the question. The Eastern Church did not adopt lay baptism till long after the time when the Western Church had embraced it. But towards the middle or the end of the fourth century, or the beginning of the fifth century, the legality of baptism administered by laymen was upheld by St. Austin, who has ever been looked upon as one of the most learned and pious of the Fathers of the Church. From this time the practice prevailed, and was allowed in both the Eastern and Western Churches; and the great objection which appears to have been made, not to the character of the testimony as to the existence of the practice, but to the value of the opinion as to the validity of that practice, was,—that St. Austin had embraced that opinion, upon an erroneous notion that baptism was absolutely necessary to salvation—that no person could by possi-

bility be saved unless he had been previously baptized ; founding it upon an erroneous application of the text of Scripture, " Unless a man be born of water and of the Spirit he cannot enter into the kingdom of Heaven." Now, supposing St. Austin had embraced that opinion, and supposing he had embraced it to such an extent as is contended for by the writers who maintain the opposite doctrine, upon an erroneous application of this passage of Scripture, it would make nothing against his testimony as to the existence and adoption by the Church of the practice of lay baptism ; and if the practice did exist in, and was adopted by, the Church at that time, that is all that is necessary for the present consideration of the Court. The existence of the practice at this very early period—during the first four or five centuries, the best and purest ages of the Church—shows that the practice does not owe its origin to the corruptions of Rome. That many superstitions were engrrafted upon this practice is true, but that will not affect the present question. And the evidence of Tertullian, St. Austin, and St. Jerome, is sufficient to establish the fact that the practice existed at this time.

After the time of St. Austin, the ancient canons bear ample testimony to the universal adoption of it as the rule and order of the Church. That such was the rule and order of the Church is to be collected from a vast number of passages to be found in the different books which constitute the canon law. It would be useless for the Court to refer to the particular canons and constitutions which apply to this subject. It is sufficient to state that the validity of lay baptism was recognized, not only by the general Canon Law of Europe, and throughout the Eastern and Western Churches, but also by the law of England, and of the English Church, long before the Reformation.

The titles of many of the paragraphs in the third part of the decree "*de consecratione*" were enumerated by my learned predecessor in his judgment in the case of *Kemp v. Wickes*, and are to be found in the report of that judgment, and every one of them is strictly applicable to the present proceeding ; and therefore the Court would refer to, and invoke them, as a part of its judgment in this case. The passages there cited are derived from St. Austin, and St. Isidore. Though the catalogue might be increased almost *ad infinitum*, I will only at present refer to one or two additional passages

from the particular law of our own Church, which show that the doctrine of the ancient Church was adopted in this country to its fullest extent, and that a great part of our baptismal service has been formed with reference to these particular canons and constitutions. These passages are to be found in the provincial constitutions made by the several Archbishops of Canterbury and the provincial synods, from the time of Stephen Langton in the reign of Henry III. down to the time of Henry Chicheley in the reign of Henry V., and thenceforward to the time of the Reformation. Such of these constitutions as were in existence in 1463, were in that year adopted by the province of York: and the whole body of these constitutions were declared by the statute of 24th of Henry VIII. to be part of the law of England, so far as they were not inconsistent with, and opposed to, the common law, the statute law, or the prerogative of the crown; and they consequently remain at the present day the law of the Church of England, provided they do not fall under either of those exceptions.

Lyndwood has collected those several constitutions, and has also in a most learned gloss upon them set forth what the law was at the time at which he wrote. Though Lyndwood may be styled a Roman Catholic canonist, and on that account not to be relied upon on a question which relates to the law of the Church at the present time, yet is he a most learned and sound expositor of the law as it stood at the time when he wrote his gloss, and the standard authority on all points of the canon law which may arise in the administration of justice in these Courts. Still I do not refer to Lyndwood as an authority for the law of the Church at the present day, except so far as that law remains unaltered from his time.

Under the title "*De Sacramentis iterandis vel non*," book i. title 7, page 40, is a constitution of Archbishop Peccham in the year 1281. "*Baptismus etiama laicis ritè administratus non est a sacerdote iterandus.*" It has been argued in this case that lay baptism was tolerated only by the Romish Church, and by the Church of England, in cases of absolute necessity. Lyndwood however has a gloss upon the word "*necessitatem*," which occurs in the constitution just mentioned, and I refer to that gloss for the purpose of showing that in cases of absolute necessity lay baptism was not only tolerated but enjoined; and that though no absolute necessity might exist, yet baptism once administered *modo et*

*formā*, which Lyndwood explains to be with water in the name of the Father, and of the Son, and of the Holy Ghost, was a sufficient baptism and was not permitted in any way to be repeated. In commenting then upon that word “ *necessitatem*,” he says, “ *Quia forsan timetur de ejus morte imminentे quo casu cuilibet licet baptizare etiam patri: unde et hæreticus tempore necessitatis potest baptizare, dum tamen cum debita intentione baptizandi sicut forman ecclesiæ.*” He then mentions other cases in which such baptism might be administered, and he concludes with these words, “ *Scias tamen quod laicus sine necessitate baptizans peccat, nam baptizare sacerdotis proprium est officium, et hoc verum solemniter. Quod licet presbyter baptizare possit præsente episcopo, quia de officio suo est; tamen præsente presbytero clericus baptizare non debet, nec laicus præsente clericō, nec mulier præsente viro.*” So that here he says, that though the priest, whose proper office it is to administer the sacrament, may administer it in the presence of the bishop, yet the “ *clericus*,” that is, a person in office below that of the priesthood, could not and ought not properly to administer the sacrament in the presence of the priest—that yet in his absence he might administer it; and though a layman might not administer it in the presence of the “ *clericus*,” nor a woman in the presence of a man, yet they were all of them at liberty to administer the sacrament provided the necessity was *absolute* at the time.

Then under the title “ *De Baptismo et ejus effectu*,” book iii. title 22, page 241, there is a gloss pretty much to the same effect, with respect to the offence which is committed by a layman baptizing a child without any necessity. The effect for which I at present cite that, is to show, that the baptism administered by a layman, where there existed no necessity for that administration arising from the dangerous illness of the child, or from other circumstances, was itself good. He says, “ *Pro vero tamen teneas quod extra casum necessitatis solus sacerdos est debitus minister ad sacramentum baptissimi. Peccaret mortaliter aliquis non sacerdos baptizans præter quam articulo mortis. Si tamen de facto aliquis non sacerdos baptizaret extra articulum necessitatis, cum tamen debita intentione et in formā Ecclesiæ, tenet Baptismus ad effectum, quod sic baptizatus non debet rebaptizari. Et idem dico de non baptizato baptizante, quia bonitas sive sanctitas ministri non est de necessitate baptismi, sed de congruentia.*” Therefore it is quite clear from this passage, that

at this time, at least in the Church of England, baptism, though administered by a person who was not duly qualified for that purpose, if administered in the proper form and with the proper words, was a good and valid baptism, at least to the extent that the baptism was not to be reiterated. And there are passages in the law which show that the repetition of baptism once administered *modo et forma*, that is, with water and in the name of the Trinity, was to be punished, in the case of a person in holy orders, by deposition or by other severe punishment, and in the case of a layman by excommunication.

I have referred to these passages for the purpose of showing that by the law of the Church of England at this period the validity of lay baptism, to the extent at least that it was not to be repeated, was admitted; and, consequently, as all this remained unrepealed and without any alteration up to the time of the Reformation, that it is to be taken to have been the actual law to be observed by all persons in the Church of England at that time—that baptism so administered was to be considered as good and sufficiently administered. So important, moreover, did the Church consider the administration of this rite, that it enjoined ministers to instruct their parishioners in the proper form of baptism, that in case of necessity arising, in case of circumstances occurring, which imperatively called for the administration of it without delay, there might be no difficulty in administering that rite which, whether wrongly or rightly, was considered necessary to salvation.

Such was the law of England up to the time of the Reformation. I have already stated that the canon law, so far as it had been received in this country, and these provincial constitutions were confirmed by an act of parliament of the 24th of Henry VIII., so far as they were not repugnant to the common law, to the statute law, or to the prerogative of the crown; and, therefore, so far as they have not been altered by later statutes, they continue to be the law at the present day.

At the time of the Reformation various alterations took place. The first of those alterations to which I shall refer is that which took place in the reign of Edward VI., for although the Reformation had made considerable progress during the reign of Henry VIII., it does not appear, I think, that any material alterations were made in the Liturgy of the Church until the reign of Edward VI.

. In the time of Edward VI. the Liturgy of the Church of England was reduced into order and revised. There were during his reign two Liturgies or Prayer Books published, one in the year 1549, and the other in the year 1552 ; and in those books the title of the form of private baptism was as follows :—“ Of them which be baptized “ in private houses in time of necessity.” Then followed this rubric, “ The pastors and curates shall warn their parishioners that they “ defer not the baptism of infants longer than the Sunday, or other “ holyday, next after the child shall be born, unless upon a great “ and pressing necessity, to be allowed by the curate ; and also they “ shall warn them, that without great cause or necessity they baptize “ not children in their houses : and when great need shall compel “ them to do so that they administer it in this fashion : First, Let “ them that be present call upon God for his grace and say the “ Lord’s Prayer, if the time will suffice ; and then one of them shall “ name the child, and dip him in the water, or pour water upon him, “ saying these words, ‘ I baptize thee in the name of the Father, “ and of the Son, and of the Holy Ghost.’ ” This having been so done, those persons having thus called upon God, and one of them having thus dipped the child into water, and said the proper form of words over it, this declaration as to the validity of the baptism so administered follows, “ And let them not doubt but that the “ child so baptized is lawfully and sufficiently baptized, and ought “ not to be baptized again.”

Nothing can be more plain and express upon the face of this direction in the rubric, than that the child is to be in cases of necessity baptized by one of the persons present, and that being so baptized it is beyond all doubt sufficiently baptized ; for it is said, “ Let “ them not doubt but that the child so baptized is lawfully and suf-“ ficiently baptized, and ought not to be baptized again.”

So far as this Prayer Book of Edward VI. goes, (and the second Prayer Book is pretty much to the same effect and without any material alteration,) it is in confirmation of that which I have already shown, by various authorities, to have been the ancient law of the Church. It proves that after the Reformation, at least to the time of Edward VI., lay baptism in cases of necessity in private houses was considered to be a good and sufficient administration of the sacrament, so that the child ought not to be brought to the church for the purpose of being again baptized.

But the rubric goes on to direct, that if the child lives, it is expedient that he be brought to the church, to the intent that the priest may examine whether the child be lawfully baptized or not. Now, considering what the law of the Church was at this time, it is hardly capable of being made a question whether this was not a direct and positive authority for the administration of baptism by laymen. Before this time, as we have seen, it was the universal practice of the Church to acknowledge such baptism as valid, and if an alteration in that respect was intended, care would have been taken to guard against the continuance of the ancient practice. In the rubric there is not a single allusion to the "priest" in the administration of the rite. But when the child is directed to be brought to the church, then for the first time the priest is mentioned. From this it would seem that in cases of necessity the absence of the priest at the time of baptism, and its administration by a layman and not by a priest, were almost necessarily presumed. The mention of the priest first occurs when the child is directed to be brought to the church in order to ascertain that all things were done as they ought to have been done, then he was to satisfy himself by inquiry of those who brought the child to the church in what manner and form the child had been baptized, and, being satisfied upon that head, he was to certify that in that case they had done well and according unto due order in baptizing the child. Neither is the reception of the child into the Church of Christ of the essence of the sacrament. The baptism is complete when the child is named, and when it is sprinkled with water, in the name of the Holy Trinity, for it is then that the sufficiency of it is declared. If the child had died at that moment, there could be no doubt, as the law then existed, that the baptism itself would have been good, valid, and sufficient. But as matter of expediency, in order that the congregation might be informed whether the child had been duly and sufficiently baptized or not, it was thought expedient that the child should be brought to the church; in order that the priest might satisfy himself that all things were done as they ought to be by those who were present at the time of the baptism, and might certify to the congregation that all was well done and in due order. Here, then, lay baptism is declared to be valid; and this rubric was confirmed by act of parliament.

The first Prayer Book of Edward VI. in 1549 was revised in the

year 1552, but no material alteration in this service appears to have been made. Upon the death of Edward VI., when Queen Mary succeeded to the throne, every thing was restored to the state in which it stood previous to the Reformation ; the Romish ritual was again brought into use, and the acts of parliament which had been passed in the former reign with respect to religious matters were repealed. But upon Queen Elizabeth's accession to the crown those acts of Mary were in their turn rescinded ; and then the Prayer Books of Edward VI. were again published, and again became the rules by which the offices of the Church were governed.

Those Prayer Books, with the rubric which I have already stated, with respect to private baptism in houses, and with respect to the sufficiency of private baptism by a person other than a priest, continued to be the law during the reign of Queen Elizabeth with certain exceptions, to which I shall presently allude. No other Prayer Book was published, I think, till the year 1595, when Queen Elizabeth's Prayer Book was published, which was to all intents and purposes the same, as (at least there was no material variation from) the book of Edward VI. During the interval, however, between 1559 and 1595, various conferences had taken place upon the subject of alterations proposed to be introduced into the Book of Common Prayer, and, amongst other things, it was required by the Puritans that the Liturgy should be so altered as to exclude women from administering the sacrament of baptism. In the year 1565 a long correspondence upon the subject took place between Bishops Grindal and Horn with Bullinger and Gualter of Zurick. In their letter, Bullinger and Gualter complained very much of the continuance of abuses in the Church—those abuses are specified at very great length in a letter which is to be found in the 3rd volume of Burnet's History of the Reformation—and amongst others (which alone it is necessary at present to advert to) they complained that the baptism of women in cases of necessity was still retained as part of the order of the English Church ; “ *Mulieres in casu necessitatis privatim posse et debere baptizare infantulos.* ” This shows that in 1565, at the date of this correspondence, the practice was still continued in cases of necessity, not only of women baptizing infants, but *à fortiori* that baptism was administered by laymen.

In reply to this, Bishops Grindal and Horn, in a joint letter, express their opinion in these words, “ *Mulieres et posse et debere*

*“baptizare infantulos nullo modo prorsus assentimur.”* They did not agree to the doctrine of the Church—that it was right and proper that women should still baptize children. That, however, continued to be the law, and unless that law has been altered it must continue to be the law of the Church: nothing appears to have been done till the Convocation of 1575. At that Convocation, which was a general Convocation of the province of Canterbury, (I think it does not appear that the province of York had any concern or connexion with that Convocation,) certain canons, fifteen in number, were made and agreed upon; and, amongst others, there was one which went directly to prohibit the administration of private baptism by any but a lawful minister, or by a deacon called to be present for that purpose. Great stress has been laid by those who deny the validity of lay baptism upon that article, as the object of it purports to have been to remove any ambiguity and doubt as to the persons by whom private baptism was to be administered.

The history of this canon is involved in great mystery and obscurity. The canons, I have stated, were originally fifteen in number; the fifteenth, I think, was withdrawn, in consequence of the Queen having refused her assent, thirteen only were printed. This canon, in particular, which related to the subject of lay baptism, was not printed with the others, though it is asserted that it was published, and possibly may have been circulated in manuscript. Gibson, in his first volume, page 369, says, that “This article was “not published in the printed copy, but whether on the same account “that the fifteenth article was left out, that is, because it was dis-“approved by the crown, I cannot certainly tell.” Such is Gibson’s observation with respect to this article.

Collier, in his Church History, has given a copy of this canon. It is to be found in vol. ii. page 552. It is the 12th canon of 1575, and he states, “This article, being particularly remarkable, I have “given it in the words of the record.” And therefore he must, I presume, have had access either to one of the original copies of the canon, or to the canon itself.

The canon is in these words, “And whereas, some ambiguity and “doubt has arisen among divers, by what persons private baptism “is to be administered, forasmuch as by the Book of Common “Prayer allowed by statute, the bishop of the diocese is to expound “and resolve all such doubts as shall arise concerning the manner,

" how to understand, do and execute the things contained in the same book, it is now by the said archbishop and bishops ex- " pounded and resolved, and every of them doth expound and " resolve, that the said private baptism, in case of necessity, is only " to be administered by a lawful minister or deacon called to be " present for that purpose, and none other." So that here there are words affirmative and negative. It is " to be administered by " a lawful minister or deacon called to be present for that purpose " and none other," and that " every bishop in his diocese shall take " order that this exposition of the said doubt shall be published in " writing before the 1st day of May next coming, in every parish " church of his diocese in this province, and thereby all other per- " sons shall be inhibited to intermeddle with the ministering of " baptism privately, it being no part of their vocation." As I have already stated, this is given in the words of the original canon according to Collier.

This undoubtedly is a very strong expression of the opinion of the Convocation, that private baptism, in cases of necessity, was only to be administered by a lawful minister, or by a deacon called to be present for that purpose, and none other; and shows that though up to this time lay baptism was considered sufficient for certain purposes at least, and ought not to be repeated, yet now there was a great alteration in the opinions of the heads of the Church and of the Crown, if assented to by the Queen, and that that which had been the law under the rubric of Edward VI. was no longer to be tolerated.

If the mandate for its publication (for it is the mandate of the archbishop) was obeyed, the copies of it must have been very numerous, yet no copies of it have been found. It is on all hands agreed, that it was not printed and published in that form with the rest of the canons. And that no trace of it should be found except two or three copies preserved in the public repositories—that there should not be found in the books or registries of any of the dioceses any allusion to its publication in the parish churches of those dioceses, is most extraordinary, considering the very great importance which must be supposed to have been attached to such a canon at the time. No allusion whatever is made to it that I have been able to find in any contemporary writer. It does not appear to have been mentioned at the Hampton Court Conferences in 1603.

It is not mentioned by Hooker, who wrote in 1585 or 1586. This document seems, so far as I have been able to ascertain, either to have been suppressed immediately after it was passed, or if it was published at all, was never considered to have any binding authority.

That canon must however have been agreed upon by the Convocation, because the archbishop's mandate for its publication is added to it, and it is not impossible that it might have received the Queen's assent, but for some reason or other it never appears to have had effect or operation given to it: whether it was that it went too far as an act of the Convocation, in purporting to repeal the rubric of Edward VI., which had been confirmed by act of parliament, and therefore it was not thought proper to publish it with the rest, though two or three copies might get abroad: whether it was supposed that the bishops had exceeded the authority given to them by the preface to the Book of Common Prayer, which is also confirmed by statute, to expound doubts and ambiguities in their respective dioceses, upon application made to them by the clergy for that purpose, and that they had not only expounded, but in point of fact repealed the statute,—what, in short, was the ground upon which it was not published, the Court is unable to conjecture. But certain it is that the only copies to be found of it are those two or three which I have mentioned, from one of which, that which is printed in Collier was taken. Surely the effect of this canon being to introduce an entirely new principle, to supersede a practice which had endured from the second or third century down to the time of the Reformation, and which had been continued through the reigns of Edward VI. and Queen Elizabeth, down to the time of 1575, it would have been most important to show that it was observed and acted upon.

And the non-appearance of this very important document is rendered still more extraordinary by the circumstance, that in the year 1584 a memorial or address was presented to Archbishop Whitgift by the Puritans, nine years after the passing of this canon, praying, amongst other things, "That all baptizing by midwives and women may from henceforth be inhibited and declared void." That is to be found in Strype's Life of Archbishop Whitgift, vol. iii. page 185. If this act of Convocation had been acted upon, if it had come into operation, the practice of bap-

tism by midwives and women must have been suppressed from that time. If this was the law which was to be carried into execution it would have had its effect, and that effect would have been to abolish the practice of baptizing by midwives and by women. But so far is it from having had that effect, that to this address, presented to him on the part of the Puritans, the archbishop replied, "That the baptism ministered by women," and therefore *a fortiori* by laymen, "is lawful and good, howsoever they minister it, lawfully or unlawfully, (so that the institution of Christ, touching the words and elements, are duly used), no learned man ever doubted "until now of late, some one or two, who, by their singularitie in "some poynts of religion have don more harme and given to the "adversarie greater advantage than any thing ells coulde doe." This was in 1584, nine years after the passing of this act of Convocation. "Neither," says he, "any of the Fathers nor that Coun-cell," referred to in the address—the Council of Carthage, "ever condemned the baptizing of women in the case of necessitie and "extraordinarilie. But that they should baptize ordinarilie and "without necessitie the Papists themselves doe not allow. I never "herde that any bishop, professing the Gospell, did give any such "authoritie to midwives," that is, to baptize ordinarily, except in cases of necessity. Therefore Archbishop Whitgift maintains the sufficiency of lay baptism by women up to the year 1584, nine years, as I have already said, after the passing of this act of Convocation.

We do not find that the practice was discontinued after this year 1584. On the contrary, in the year 1595 Queen Elizabeth's Prayer Book is published, containing the very same rubric and the same directions for the performance of private baptisms, as were contained in Edward the Sixth's Prayer Books in 1548 and 1552, and it is most extraordinary, if this act of Convocation was supposed to have, or intended to have, the effect which has been contended for in the argument, that this practice should have continued, and that no notice should have been taken of it in that Prayer Book which was published by Queen Elizabeth in 1595, but that the rubric for the office of private baptism therein contained should be of precisely the same tenor as that which had been contained in the Prayer Books of Edward VI. in 1548 and 1552, and should have directed that one of the persons present should dip the child

in water, or pour water upon him, using the proper form of words ; and that having so done, they were not to doubt that that child was well and sufficiently baptized, and ought not to be baptized again.

Nor is it contended that the practice of lay baptism ceased at this time. It is admitted on the part of Mr. Escott, that the practice of lay baptism, which had prevailed for nearly 1200 years before, continued to be tolerated, though not approved, down to the period of the Hampton Court Conferences in 1603.

Immediately upon the accession of James I. the Millenary Petition, as it was called, from the great number of names subscribed to it, was presented to him, in which the Puritans of that time complained again of the existence of the practice of baptism by women, and required that baptism should not be administered by women, and that it should be so explained ; at this time, therefore, it is evident that the practice still continued. It is remarkable that in this address of the Puritans their demand was limited to the abolition of the practice of baptizing by women and by midwives. Their objection was not to the administration of baptism by laymen according to the practice of the primitive Church.

The consequence of this petition was, that a Conference was held at Hampton Court between a certain number of persons selected on the part of the Puritans, and certain bishops, eight in number, six deans, the dean of the chapel royal, and two doctors of divinity. The first of these Conferences was held on the 14th of January, 1603, in the presence of the king and the lords of the council.

A short account of what passed at that Conference was communicated to some friends in Scotland by Dr. James Montague, the dean of the chapel royal, in a letter dated 18th January, 1603, and is to be found in the " History of the Conferences on the Book of Common Prayer," page 128, published by Dr. Cardwell. It is there stated, that the points propounded by the king for discussion were six ; three were respecting alterations proposed in the Common Prayer Book, two with respect to the bishop's jurisdiction, and one with respect to the kingdom of Ireland. The three alterations proposed in the Book of Common Prayer related to the general absolution, to the confirmation of children, and the private baptism by women. The latter is that to which alone it is necessary that the attention of the Court should be addressed for the present purpose.

The discussion upon private baptism, as Dr. Montague states, occupied three hours at least, " the king alone disputing with the " bishops so wisely, wittily, and learnedly, with that pretty patience " as I think never man living heard the like;" and then he states that " in the end he won this of them, that baptism should only be " administered by ministers, yet in private houses if occasion re- " quired, and that whosoever else should baptize should be *under punishment.*" Not that the baptism should be annulled, but that if any person except a lawful minister should take upon himself to perform the ceremony of baptism, that person should be punished. It was not that the person so baptized should be rebaptized, but that the administrator, who had usurped the priest's office without authority, should incur the censure of the law.

" To this narrative," says Cardwell, " was added the following " note of such things as shall be reformed." Then follows a summary of the result of the discussion, under fifteen heads: and Dr. Cardwell states in a note, " This is copied from Strype, (Whitgift, " vol. ii. page 501,) who took it from a paper in the handwriting, as " he believed, of Bishop Bancroft (of London)," one of the bishops who were present at this Conference. The third head is, " The " private baptism now by laymen or women shall be called, ' The " private baptisme by the ministers only, and all those questions " in that baptisme that insinuate it to be done by women taken " awaye.' "

A more particular account of what passed, and of the views entertained by the several bishops who attended at that Conference, is given by Dr. Barlow, who was dean of Chester, and who was also present upon that occasion, Cardwell's Conferences, p. 169; it is headed, " The Summe and Substance of the Conference which it " pleased His Excellent Majestie to have with the Lords, Bishops, " and others of his Clergy, (at which the most of the Lords of the " Councill were present,) in his Majestie's Privy Chamber at " Hampton Court, January 14, 1603. Contracted by Wm. Barlow, " Doctor of Divinity, and Dean of Chester." He gives a history of the first day's Conference, and the names of the bishops who were present, and then states the points for discussion as they had been stated by Dr. Montague. He says, " The third was private " baptism: if private for place, his majesty thought it agreed with " the use of the primitive Church; if for persons, that any but a

" lawful minister might baptize anywhere he utterly disliked ; and " in this point His Highnesse grew somewhat earnest against the " baptizing by women and laikes." He goes on to state, in page 174, after some discussion upon other points, " In the third place " the lord archbishop (that is, Whitgift) proceeded to speak of " private baptism, showing his majestie that the administration of " baptism by women and lay persons was not allowed in the practice " of the Church but enquired of by bishops in their visitation and " censured, neither do the words in the book inferre any such mean- " ing."

Now, if Archbishop Whitgift meant to say that the words of the rubric of Edward VI. did not contain any permission for laymen to baptize, it is certainly extremely difficult to know what words could express that meaning with more perspicuity and more expressly. But if he meant that it was not intended to encourage, or to sanction, the administration of that rite except in cases of necessity by women or by laics, then we can understand his meaning when he says that the words do not infer any such meaning ; that is, that baptism by women and laymen was not allowed by the Church except in cases of necessity, and that inquiry was made by the bishops in their visitation and a censure passed upon persons who so administered it without necessity. That would be perfectly intelligible. " The Bishop of Worcester said that indeed the words " were doubtful and might be pressed to that meaning ;" that is, giving permission to women and lay persons to baptize ; " but yet " it seemed by the contrary practice of our Church (censuring " women in this case) that the compilers of the book did not so " intend them, and yet propounded them ambiguously, because " otherwise perhaps the book would not have then passed in the " parliament." Dean Barlow adds, " And for the conjecture, as I " remember, he cited the testimony of my Lord Archbishop of " York," that is, Hutton, who was Archbishop of York at that time ; and there is a letter inserted in this Book of Conferences to the effect which is here stated, that he was informed by some of the reformers that they had left those words so ambiguously in order to prevent any successful opposition being made to the passing of the act of parliament. Whereunto the Bishop of London, " Bancroft," replied, " that those learned and reverend men who " framed the Book of Common Prayer intended not by ambiguous

“ termes to deceive any, but did indeed by those words intend a permission of private persons to baptize in case of necessity, “ whereof their letters were witnesses.” So that he puts it upon that which is stated in the title, “ Private Baptism in Houses in “ Cases of Necessity.” Then he refers to some parts of those letters in order to show “ that the same was agreeable to the practice of “ the ancient Church ; urging to that purpose both Acts ii. where “ three thousand were baptized in one day, which for the Apostles “ alone to do was impossible, at least improbable ;” . . . and “ also “ the authority of Tertullian and St. Ambrose, and the fourth to “ the Ephesians,” which I mentioned before, “ plain in that point, “ laying also open the absurdities and impieties of their opinion, “ who think there is no necessity of baptism ; which word ‘ neces- “ sity’ he so pressed, not as if God without baptism could not save “ the child, but the case put, that the state of the infant, dying un- “ baptiz’d, being uncertain and to God only known ; but if it die “ baptiz’d there is an evident assurance that it is saved :” and then he continues, “ who is he that having any religion in him would not “ speedily, by any means, procure his child to be baptiz’d, and “ rather ground his action upon Christ’s promise, than his omission “ thereof upon God’s secret judgment.”

“ His Majesty replied first to that place of the Acts of the “ Apostles, that it was an act extraordinary, neither is it sound “ reasoning from things done before a Church be settled and “ grounded, unto those which are to be performed in a Church “ stablished and flourishing ; that he also maintained the necessity “ of baptism, and always thought that the place of St. John to “ which he referred, ‘ *nisi quis renatus fuerit ex aqua*,’ &c., was “ meant of the Sacrament of Baptism, and that he had so defended “ it against some ministers in Scotland. ‘ And it may seem strange “ to you, my Lords,’ saith his majesty, ‘ that I who now think you “ in England give too much to baptism, did, fourteen months ago, “ in Scotland, argue with my divines there for ascribing too little to “ that holy sacrament.’ ”

Then he refers to that which it is not necessary to read ; a conversation between himself and “ a pert minister,” as the king describes him, with respect to the extent to which baptism was necessary. Then after that it is stated: “ But this necessity of “ baptism his majesty so expounded, that it was necessary to be

“ had where it might be lawfully had, *id est*, ministered by lawful ministers, by whom alone, and by no private person, he thought it might not in any case be administered, and yet utterly disliked all re-baptization, although either women or laikes had baptiz'd.”

So that the opinion of the king was, that, though he disliked the administration of baptism by any but by lawful ministers, and thought private persons ought not in any case to be permitted to administer it, yet notwithstanding all this, if there had been a *de facto* baptism, he disliked all re-baptization, although women or laics had baptized. That is the expression he makes use of. In other words, as Lyndwood expresses it in his Commentary, which I have already referred to, “ *quod sic baptizatus non debet rebaptizari.*”

The king having expressed this opinion, “ the Bishop of Winchester spake very learnedly and earnestly in that point, affirming that the denying of private persons, in cases of necessity, to baptize, were to cross all antiquity, seeing that it had been the ancient and common practice of the Church, when ministers at such times could not be got, and that it was also a rule agreed upon among divines, that the minister is not of the essence of the sacrament;” as Lyndwood expresses it in one of the glosses to which I have already adverted, “ *Bonitas aut sanctitas ministri non est de necessitate baptismi, sed de congruentia.*” “ The king answered: ‘ Though the minister be not of the essence of the sacrament, yet is he of the essence of the right and lawful minister of the sacrament.’ ” But still his majesty adhered to this opinion, that though he disliked the administration of it by any but a lawful minister, yet he utterly disliked all re-baptization, and therefore affirmed that the baptism was good and effectual, at least to a certain extent.

The result, as I have already stated from Dr. Montague's Letter, was the insertion of the words “ lawful minister,” in the rubric; so that whereas in the former rubric it had been “ one of them that be present,” it was to be altered that a lawful minister was to call upon God for his grace, and a lawful minister was to administer the sacrament; that was the utmost extent to which the king could prevail upon the bishops to agree. They would not agree to abolish altogether the administration of the sacrament by laymen or by women; but they consented to insert, which must therefore

necessarily have been as a measure of order and of regularity only the words " lawful minister," as being the proper administrator of the sacrament, but not essential to its validity. The result of this long debate being, that the seeming or actual sanction given by the rubric of Edward VI. to private baptism by laymen, should for the future be omitted.

It is quite clear, I think, that the discussion must have been upon the propriety of distinctly and expressly prohibiting lay baptism, if not of declaring it absolutely null and void. Otherwise, what was there for the bishops to " stick at." They did not " stick so much" at the insertion of the words " lawful minister ;" therefore they must have " stuck at" something else ; and, from the very nature of the discussion, the question must have been whether or not lay baptism was to be peremptorily prohibited, or perhaps even pronounced and declared null and invalid to all intents and purposes. But the utmost extent to which the king could prevail upon the bishops to go, was to insert the words " lawful minister" where the words " one of them that be present" had been previously inserted.

I think the result of this Conference at Hampton Court is not that which is alleged by Mr. Escott, in his Allegation, namely, that from that period to the present day, that is, from 1603, the Liturgy of the Church of England has not allowed the rite of baptism, performed by unordained persons, to be valid, but has held the direct contrary. It appears to me, that though the persons engaged in that Conference did all that they could to discourage the administration of baptism by laymen and by women, yet that they could not prevail upon themselves absolutely and expressly to prohibit, still less to declare such baptism altogether null and void.

The Liturgy and Rubric were afterwards altered according to the decision of the king and of the bishops at that time; and the king, by a proclamation which he issued very shortly afterwards, which is found in page 225 of the same book, recited generally what had taken place at Hampton Court upon the occasion of those Conferences, the result of which he states in the proclamation to have been, that he thought no alteration necessary ; that he thought " that some small things might rather be explained than changed ; " " not that the same might not have been very well borne with by " men who would have made a reasonable construction of them."

This, certainly, is not the language which would have been used if so great an alteration as that which is contended for, had been contemplated in the ritual of the Church, as to the mode of administering baptism in private houses. Could he have said, " that some " small things might rather be explained than changed," if the whole system or practice of twelve or thirteen hundred years was to be entirely swept away, and, contrary to that system and practice, the administration of baptism expressly confined to the lawful minister ; and if not so administered, that the ceremony was to be altogether invalid.

The language employed, to say the least of it, must be considered as extremely ambiguous ; and I cannot understand, if the king and the bishops had been at that time of opinion that lay baptism was invalid, why they should have scrupled to express their opinion upon the point as plainly as was done in the Articles of 1562, with respect to the doctrine of purgatory, of pardons, of the worshipping and adoration of images and relics, and the invocation of saints, and with respect to the number of the Sacraments, and many other corruptions of the Church of Rome, from which the Church of England was at that time purged. This point was of equal importance with those ; and one upon which, with reference to the comfort of the people, it was absolutely necessary to have spoken plainly, in order that all doubts might be removed from the minds of the king's subjects, as to the sufficiency or insufficiency of baptism administered by any other than a lawful minister. It never could have been intended by those who attended this Conference for the purpose of determining this very important point, to have left the matter still in doubt and ambiguity, if they had been clearly and decidedly of opinion that a baptism administered by laymen was altogether null and invalid.

Under these circumstances the Court is, I think, warranted in saying, that up to this time the Church had not pronounced, and at this time did not by any express act or declaration pronounce, lay baptism to be invalid, and that if the law at the present be, that lay baptism is invalid, it must have grown out of some subsequent alteration. Undoubtedly at this time the inclination of the Church was to discourage lay baptism to the utmost extent ; but I cannot think it is to be inferred, that the king or the bishops were of

opinion that it was invalid. Indeed, the more important they thought it to discourage it, the more it would be incumbent upon the Church to declare, in express and positive terms, its opinion that it was invalid, if they had arrived at any such opinion.

The practice does not appear, after this period, to have ceased, because we find an objection to the practice formed part of the representations made by the Presbyterians to the crown at the time of the Restoration. Indeed, it is quite clear, that at the time of the Restoration, and for the last ten or twelve years at least before that period, there could have been no public administration of the Sacrament of Baptism by lawful ministers.

That which took place at the time of the Restoration was undoubtedly of very considerable importance, because those alterations which had, previous to that time, stood on the sole authority of the king, not as an act of Convocation (for it was only the king and a certain number of the bishops who had been assembled for the purpose of discussing these points), became then the law of the land, inasmuch as the Liturgy and Rubric of 1661 was not only adopted and subscribed by the clergy of both Houses of Convocation and of both provinces, but was confirmed by an act of parliament passed in the 13th and 14th years of the reign of Charles II. The alteration determined upon by James I. and the bishops could not repeal the Act of Uniformity by which the Rubrics and Prayer Book of Edward VI. had been confirmed; and therefore, up to this time, those Prayer Books were in point of fact the only legal form to be observed as to the several services which were contained in those books. The alteration made by James I. had not the authority of law, though it might be submitted to for convenience, and because it was thought that the alterations which were made in those instances which I have mentioned, were right and proper to be made.

But at the time of the Restoration in 1661, certain other alterations were made in the Book of Common Prayer. We all know that various Conferences were held at the Savoy, for the purpose of endeavouring to reconcile the objections of certain divines to the Book of Common Prayer. Certain of the bishops and certain of the leaders of the Presbyterians met for the purpose of seeing whether they could not agree upon such alterations as would be satisfactory to both parties; but in consequence of the extent of

the demands made by the Presbyterians, which, if agreed to, would have required not an alteration only, but an entirely new modelling of the Liturgy, those Conferences became ineffectual for their purpose, and were accordingly broken off. The two Houses of Convocation, however, proceeded to the revision of the Prayer Book, and the book so revised was approved by the king, and afterwards by the two Houses of Parliament, and as I have already stated, was confirmed by the statute of the 13th and 14th of Charles II. From this time, from the year 1661, little or no alteration has been made in it. In substance it remains as at that time. The rubrics form a part of the statute law, to which every person, both clerical and laic, is bound to conform, except so far as in any particular case special exemptions have been introduced by subsequent statutes.

Now the important part of the rubric to be considered at this time is that which is prefixed to the Service for the Burial of the Dead, because by that rubric, for the first time, it is declared that persons who die unbaptized are not to have this service read over them. It may be here observed, however, that though the word "unbaptized" was then inserted for the first time in the rubrics of the Church, yet the old law equally prohibited the interment with the prayers of the Church, of those who had died unbaptized by their own fault. Some difference was made, as we know by reference to writers upon the subject, and as a matter of history, between those who died wilfully unbaptized, and those who died so by unavoidable misfortune or accident. But it is stated in this rubric, that the Burial Service is not to be used over persons who die "unbaptized;" and the question to be considered is, whether this word "unbaptized," in this rubric, bears any interpretation different from that which it bore in the ancient canon law, or which was given to the term "not baptized" in the former rubrics.

In its usual and general sense, the word unbaptized would apply to persons to whom the sacrament had not been administered, without respect to the person by whom it was administered. But it has been contended, that at this time the Church and the legislature must have used the word in a more restricted and narrow sense; that they must have intended to apply it to persons who had not been baptized by a person who, according to the rubric for baptism, was alone authorized and commissioned to administer baptism,

namely, a lawful minister; and that is contended to have meant in 1661, and at this time to mean, a minister episcopally ordained. So that the expression "lawful minister," as used in the rubric of 1661, would bear a different interpretation from that which must have applied to it in the reign of James I., because in the year 1661, the preface to the Ordination Service, which is also confirmed by act of parliament, directed that no person should be taken or accounted to be a lawful bishop, priest, or deacon in the Church of England, or suffered to execute any of the said functions, who was not in holy orders, or had not been previously called, tried, examined, and admitted thereunto according to the form hereafter following, or hath had formerly episcopal ordination. Whereas down to that time, a person—who had been admitted bishop, priest, or deacon by competent authority, not necessarily implying by these words episcopal authority—was permitted to continue to exercise his functions, and consequently his administration of the sacrament was good and valid, and persons baptized by him were considered as members of the Christian Church. The alteration, however, made by the preface to the Ordination Service in 1661, disentitles any person to the appellation of "lawful minister," within the meaning of the rubric, who had not obtained episcopal ordination, not necessarily by a bishop of this realm; for the practice has been, and still is, to receive into the Church of England, and to permit to exercise spiritual functions in the Church of England, those who have received ordination at the hands of foreign bishops, particularly Roman Catholic Bishops—and this without conferring fresh orders, but only upon a renunciation of the errors of the Church to which they had previously belonged.

The act of parliament of 1661, therefore, makes it necessary that a person shall be episcopally ordained in order to be a bishop, priest, or deacon of the Church of England, or to hold any preferment in the Church of England. But supposing that a Presbyterian should present himself for ordination to the bishop, and if upon examination he was found duly qualified for office in the Church, I apprehend that there would be no difficulty whatever in admitting that person to holy orders, and ordaining him, without his being rebaptized. Supposing that a Presbyterian, having been baptized in his own country by a Presbyterian minister, had come to this country, and had presented himself for ordination, it would not be requisite,

either before he was admitted into communion with the Church, or before he was ordained a minister, that he should be rebaptized. And therefore, although in using the words "lawful minister" in the baptismal service, the law intended a person who was a lawful minister according to the law of England, that is, since 1661, an episcopally ordained minister, it does not follow that acts performed by persons who were not so ordained are invalid. I apprehend that no question would arise as to the validity of a baptism performed by a Presbyterian minister, for the purpose of enabling a person so baptized to receive orders.

Bishop Fleetwood argues very strongly upon this point in his work "Judgment of the Church of England on Lay and Dissenting Baptism." In page 554, speaking of lay baptism, he says, "For the first fifty years after the Reformation the Church of England allowed of baptism performed by neither bishop, priest, or deacon, and declared that a child so baptized was fully and sufficiently baptized, and ought not to be baptized again." That is, with reference to the rubric of Edward the Sixth. And then he says, secondly, "The Church of England in the next fifty years, that is, from James the First to Charles the Second, did call for a lawful minister to baptize children, but she did not say all that while that all they who were not episcopally ordained were not lawful ministers, for she admitted and instituted into her parish cures such as had not been episcopally ordained, and consequently admitted their baptism to be good and valid. Thirdly, it is not a due nor just, much less a necessary consequence, that because the Church of England calls for a lawful minister to baptize, and calls none but such as have been episcopally ordained a lawful minister, she should therefore appoint no baptism valid but such as is administered by an episcopal hand." And then he proceeds to show that if such were the interpretation put upon the rubric, it would exclude all administration of the rite of baptism by Presbyters of France, Germany, Scotland, and Holland, whose acts, however, they say, would not be sanctioned or allowed here, that is, by the law of the Church.

He goes on to say: "The Church of England will have none but episcopally ordained ministers to baptize in England. But does she thereby disannul (in her judgment and opinion) the baptisms of all those countries that are administered by Presbyters? Was

“ it ever understood that if a French, Helvetic, German, Scottish, or Dutch Presbyter should desire to communicate with the Church of England, he was to be first baptized ? If he desire to be a clergyman, and hold a benefice or obtain a dignity in the Church of England, he must indeed be ordained according to the English form, or by some episcopal hand elsewhere, for that has been the law since 1661 ; and no one can since that time be accounted a lawful minister but such a one. But does it follow from thence that all the children they had formerly baptized were not Christians ? For that is in fact the question. Will it be contended that those who are not baptized by a lawfully ordained minister are not Christians ? This is indeed a consequence made by those rebaptists, but this consequence is not made by the law of England.”

He then proceeds to show that many foreign Protestants, and several Dissenting ministers at home, had been ordained without having been baptized anew ; and he argues from thence that they must have been considered Christians though baptized by Presbyterian hands, otherwise they would not have been ordained. “ For when was it heard,” he says, “ either of old or late, that a man could be ordained a priest who had not been baptized ? ”

Therefore he shows most clearly and conclusively, that baptisms by persons who were not of episcopalian ordination, nevertheless, were good and valid baptisms, though a Presbyterian could not be considered as a lawful minister under the rubric of 1661. The whole of the work of this very learned prelate is extremely well worth perusal and study. It embraces the whole of the arguments both for and against lay baptism, as sanctioned by the Church of England ; not, indeed, as to its abstract validity or invalidity, but entirely confining himself, as he expressly states, to an inquiry into the judgment of the Church of England upon it.

But, as I have stated, this rubric as to private baptism was at that time altered, and if the administration of baptism was thenceforth to be strictly confined to a lawful minister, that is, an episcopally ordained minister, then no baptism could be valid without the intervention of an episcopally ordained minister ; and none of the privileges consequent upon valid baptism would be imparted to those who had been baptized by any other than a lawful minister.

But if this were so, it is extraordinary that the only instance

which can be found of a proceeding with respect to the refusal to inter a child or person baptized by a dissenting minister, or by any person other than a lawful minister, is the case of *Kemp v. Wickes*, in 1809. I pass by that case which was mentioned as arising at Daventry, which, in fact, has not any bearing upon this part of the case, because when that case came to be examined, it appeared that a criminal information had been moved for against the clergyman of Daventry for refusing to admit to interment the body of an Anabaptist. In the first instance, upon an affidavit stating that interment had been refused in the churchyard, a rule *nisi* for a criminal information was granted by the Court; but when it came to be explained that what he had refused to do was not to permit the body to come into the Church, or to be interred in the churchyard, but to read the service over the body, because he was not satisfied that the person had been baptized, that rule was dismissed. It was dismissed without costs; because, as I apprehend, it appeared that through inadvertence the gate of the churchyard through which the body was to be carried had been locked, and therefore there was not access had to the churchyard for the purpose of that common law right which could be enforced by application to a Court of Common Law. I apprehend that is the whole of that case. A rule for a criminal information was in the first instance granted, and afterwards dismissed upon the ground that it was only the performance of the burial service over the body that was refused, and not the interment in the churchyard; and the doctrine laid down in that case was, that the common law right of interment in the churchyard belonged to every parishioner, and that that could be enforced in a Court of Common Law, but that the manner in which the service was to be performed was to be left to the Spiritual Court, and there to be enforced.

I have said that it seems to me extraordinary that the case of *Kemp v. Wickes* is the first case that appears upon the records of this Court that I am aware of, and the only case that has occurred, with the exception of that which took place at Gloucester, at about the same period, or rather antecedently to the decision of the case of *Kemp v. Wickes*; and which, upon the explanation which was given of it on the second day's argument by Dr. Nicholl, turned out to be no precedent at all, or rather something worse than a precedent, looking at the nature of the proceedings in that case.

The case therefore of *Kemp v. Wickes* is the only case which has occurred in which the question has been raised as to the right to interment of persons baptized by any other than an episcopally ordained minister. This I say is somewhat extraordinary, considering that the construction contended for is, that since the year 1661 no person could be validly baptized by any but an episcopally ordained minister. Yet such is the fact. We do not find from the historical writers, that any of the bishops, at their visitations held after the Restoration, either refused to confirm persons who had been baptized (as many must have been from the year 1648 to 1660,) by persons who were not episcopally ordained, or that they impressed upon the clergy the necessity of rebaptizing them. This is in substance the argument used by Bishop Fleetwood in his work; for it must be apparent to every body who has heard this case discussed, that we are all drawing our information from the same sources—the writings of those who have before discussed this subject at great length, and with great acuteness and ingenuity. We do not find that the bishops in their visitation charges impressed upon their clergy the necessity of rebaptizing those who had received baptism from unauthorized hands. Nothing of the kind appears, nor does it appear that those persons who had been so baptized were excluded from the Sacrament of the Lord's Supper, or that the clergy were advised that they should not admit such persons to Christian burial, as a lawful minister was the only person who could validly baptize, and as the rubric had expressly declared that the service was not to be read over those persons who had died unbaptized.

The absence of all allusion to these circumstances shows that in the opinion of those by whom the law was framed, it was not intended to include within the term “unbaptized” those who had been baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, though not by a lawful minister, which from 1661 meant a minister who had received ordination from episcopal hands. In fact, the practice continued as it was, irregular, undoubtedly, but not null and void.

Nothing can show this more clearly than that which took place at the beginning of the last century, in the year 1712, which led to certain Conferences at Lambeth upon the subject—the last epoch before the case of *Kemp v. Wickes* upon which any very great dis-

cussion arose with respect to the validity or invalidity of lay baptism; and it was about that time that all those writers who had espoused one side or other of the subject, ushered their productions into the world.

Bishop Burnet, in his History of his Own Times, says, "Another conceit was taken up of the invalidity of lay baptism," (he is now writing of the period of 1712), "on which several books had been writ. Nor was the dispute a trifling one, since by this notion the teachers amongst the Dissenters, passing for laymen, said this went to the rebaptizing them and their congregation." He says, "Dodwell gave rise to this conceit. He was a very learned man and led a strict life—he seemed to hunt after paradoxes in all his writings, and broached not a few. He thought none could be saved but those who by the sacraments had a federal right to it, and that those were the seals of the covenant—so that he left all who died without the sacraments to the uncovenanted mercies of God, and to this added, that none had a right to give the sacraments but those who were commissioned to it, and these were the apostles, and after them the bishops and priests ordained by them. It followed upon this, that sacraments administered by others were of no value."

He then goes on to state, "This strange and precarious system was in great credit among us, and the necessity of the sacrament, and the invalidity of ecclesiastical functions when performed by persons who were not episcopally ordained, were entertained by many with great applause." He says, "This made the Dissenters pass for no Christians, and put all thoughts of reconciling them to us far out of view; and several bitter books were spread about the nation to prove the necessity of rebaptizing them, and that they were in a state of damnation till that was done. But few were by these arguments prevailed upon to be rebaptized. This struck even at the baptism by midwives in the Church of Rome, which was practised and connived at here in England till it was objected to at the Conference held at Hampton Court soon after James the First's accession to the crown, and baptism was not till then limited to persons in orders." He says, "Nothing of this kind was so much as mentioned in the year 1660, when a great part of the nation had been baptized by Dissenters." That is, that lay baptism was invalid, and that parties so baptized were

not entitled to be considered as Christians. "But it was now," he says, "promoted with much heat. The bishops thought it necessary to put a stop to this new and extravagant doctrine; so a declaration was agreed to, first against the irregularity of all baptisms by persons who were not in holy orders, but that yet according to the practice of the primitive Church, and the constant usage of the Church of England, no baptism (in or with water in the name of the Father, Son, and Holy Ghost) ought to be reiterated."

Then Burnet goes on to state that which perhaps is not quite strictly correct, but his statement is rectified in the life of the prelate to whom I am about to refer, which was written by his son, and corrected, as he states, from papers in the handwriting of his father. Burnet says, "The Archbishop of York at first agreed to this; so it was resolved to publish it in the name of all the bishops of England: but he was prevailed on to change his mind, and refused to sign it, pretending that it would encourage irregular baptism; so the Archbishop of Canterbury, with most of the bishops of his province, signed it, and resolved to offer it to the Convocation. It was agreed to in the Upper House—the Bishop of Rochester only dissenting. But when it was sent to the Lower House, they would not so much as take it into consideration, but laid it aside, thinking it would encourage those who struck at the dignity of the priesthood." He says, "This is all that passed in Convocation."

In the "Life of Archbishop Sharp," published by his son, a somewhat different version of the story is given. But the facts are substantially the same. The ground of rejection of the declaration appears to be the same according to both accounts,—namely, that there was a danger of encouraging dissenting baptisms, by publishing a declaration of the Bishops of the Church. So that instead of being issued as a declaration of all the bishops of both provinces, it was confined to the province of Canterbury, signed by the archbishop, and most of the bishops of his province, and was agreed to in the Upper House of Convocation, the Bishop of Rochester only dissenting; and it declared, that though baptism by persons not episcopally ordained was irregular, yet according to the practice of the primitive Church it was valid.

In the account given in "Archbishop Sharp's Life," from papers

in his son's possession, and which, therefore, in addition to being published by his son, may be supposed to be correct, he says,— “ Tuesday, April 22, at 11 o'clock I went to Lambeth. We were “ in all thirteen bishops. We had a long discourse about lay bap- “ tism, which of late hath made such a noise about the town.” So that it is clear that at this time lay baptism was practised, though not considered regular. “ We all agreed that baptism by any other “ person except lawful ministers, ought, as much as may be, to be “ discouraged.” This is in 1712. The rubric had been confirmed by act of parliament in 1661, to the effect that lawful ministers were the persons by whom baptisms ought to be administered. “ We “ all agreed that baptism by any other person except lawful minis- “ ters ought, as much as may be, to be discouraged, nevertheless “ whoever was baptized by any other person, and in that baptism “ the essentials of baptism were preserved, that is, being dipped or “ sprinkled in the name of the Father, &c. such baptism was valid “ and ought not to be repeated.” That is the declaration of the Archbishop of York, of what was the opinion of all the bishops at that time in town: that lay baptism in the name of the Father, and of the Son, and of the Holy Ghost, was valid and ought not to be repeated.

His son, Archdeacon Sharp, goes on to say, “ This indeed is the “ sense of the Church of England, as will appear to any person who “ considers the rubrics in the office for private baptism, and com- “ pares them with one another, and with the previous questions in the “ office itself. From all which laid together, it may be plainly collected “ that where the essentials, matter and form have been preserved, “ though administered by another hand than that of a lawful minister, “ the baptism shall not be so much as hypothetically repeated; yet “ nevertheless it is so far condemned and disapproved, as irregular “ and uncanonical, that the child or person so baptized shall not be “ received into the congregation. But the officiating minister must “ have recourse to the directions of his ordinary, as in other irre- “ gular, and uncommon, and difficult cases. But as our Church “ hath no where openly and expressly declared for the validity of “ lay baptism, or allowed it to be administered by laymen, in any “ case, how extraordinary soever, some handle is left for disputing “ or speaking doubtfully about her sense of the matter. There- “ fore his Grace of Canterbury, finding so many bishops unanimous

" in their opinion, thought it would be of public service if they " all joined in publishing a declaration of their sentiments, which " would appear as a kind of decision of the point, and might help " to make the minds of some men more easy, at least to shorten " the disputes then raised upon this question."

He then inserts a letter of the Archbishop of Canterbury to the Archbishop of York, to this effect: " In pursuance of the agreement made here by your grace and the rest of my brethren the bishops, when I had the favour of your good companies on Easter Tuesday, I met yesterday with some of them, and we drew up a paper suitable (as we judge) to the proposal then made. It is short and plain, and I hope inoffensive, and for a beginning, as I humbly conceive, full enough. I here enclose a copy of it for the perusal of your grace, and of as many others as your grace shall think fit to show it to." He says, " I send this declaration unsigned, because we who were present, desired first to have the opinions of your grace and others who were absent, and should be glad to know whether you would have anything added to it, or altered in it, for we affect not the vanity of dogmatizing."

Now the declaration is to this effect, " Forasmuch as sundry persons have of late, by their preaching, writing, and discourses, possessed the minds of many people with doubts and scruples about the validity of their baptism to their great trouble and disquiet, we the archbishops and bishops, whose names are underwritten, have thought it expedient on us to declare our several opinions, in conformity with the judgments and practice of the Catholic Church, and of the Church of England in particular, that such persons as have been already baptized in or with water, in the name of the Father, Son, and Holy Ghost, ought not to be baptized again. And to prevent any such practice in our respective dioceses, we do require our several clergy, that they presume not to baptize any adult person whatsoever, without giving us timely notice of the same, as the rubric requires."

This declaration, drawn up and issuing from the bishops, directly shows that in the opinion of all those persons the law of England and of the English Church remained as it was before the Reformation—as it was during the time of Edward VI. —as it was from the time of James I. to the Restoration—namely, that baptism administered with water, in the name of the

Trinity, though by a lay person, was nevertheless good and valid, and ought not to be repeated. It affords, I say, a strong indication of the opinion of persons who lived at this period of time, and who were acquainted with the law and the practice of the Church at that time.

Now the Archbishop of York in reply writes in these terms : “ I “ had the honour of your grace’s letter (with the declaration inclosed) “ the last night. I am entirely of the same sentiments that we all “ declared we were, when we had the honour to dine with your “ Grace the last week. But yet, for all that, I can by no means “ come into the proposal your Grace has now made in your letter ; “ in that we should all *declare* (which is printed in italics) under “ our hands the validity of lay baptism.” He had agreed with the others as to the validity of lay baptism, and there is no alteration in the archbishop’s opinion as to the validity of lay baptism ; but he doubted the expediency of declaring such an opinion. He says, “ I can by no means come into the proposal your grace has now “ made in your letter, in that we should declare under our hands “ the validity of lay baptism”—for this reason, “ for I am afraid “ this would be too great an encouragement to the Dissenters to go “ on in their way of irregular uncanonical baptisms. I have, as “ your grace desired me, communicated this matter to three of our “ brethren, the Bishops of Chester, Exeter, and St. David’s, and we “ have had a full discourse about it, and we are all of the same “ opinion that I now represent.”

And then the son of the archbishop states the reason why he had thus given this at length. He says, “ The account of this matter “ is the more fully set down here, because Bishop Burnet has not “ represented it in a favourable light with respect to Archbishop “ Sharp.” And then he gives the account I have already read from Burnet.

This, therefore, is beyond all doubt, that up to 1712 the opinion of the Church of England was, that lay baptism was valid—that it was not to be repeated—and that a person who had been baptized by a layman was not a person unbaptized ; and up to this time there had been no notion that a person so baptized was not entitled to the rites of Christian burial. Indeed, the very first time, as was pointed out in the argument by one of the learned counsel, at which any notion of this kind seems to have been entertained, or even to have been hinted at, is by Bishop Fleetwood, who, in summing up his

argument, amongst other things says, that he never would believe that the Church of England did not hold the validity of lay baptism, though irregular, until the bishops should order their clergy, both by preaching, writing, and discoursing, to tell their congregation that unless they have been baptized by episcopal hands they are not Christians; they must not come to the blessed sacrament; they ought not to be married by the appointed form which supposes both parties to be Christians; nor can they, nor ought they, to have Christian burial; the rubric (confirmed by act of parliament and Convocation) expressly excluding unbaptized persons. Here is the first time at which any suggestion seems to have been made by any of the writers whom I have been able to consult upon this occasion, that one of the consequences of the denial of the validity of lay baptism would be the exclusion of persons so baptized from Christian burial.

Now, I say, that at this time it is quite clear that the opinion of the Church was, that lay baptism was valid. I do not say, nor am I called upon to say, whether in my opinion that which was maintained by all the bishops present at Lambeth in 1712 is well founded, or not. Whether baptism administered by laymen is abstractedly good and valid according to the intention of the Divine founder of the sacrament, or not, is not the question for me. The question for me to determine is, what has the Church of England said upon the subject? Nothing can be more clear, from the whole history of the Church, from its very early ages, or at least from the time when St. Augustine flourished in the fourth and fifth centuries, down to the time of the Reformation, and from that time down to the year 1712, than that the baptism of persons who were baptized according to the proper form by any person other than a lawful minister was considered to be a valid and sufficient baptism; and if it was valid and sufficient at that time, it is equally valid and sufficient now; for no alteration whatever has taken place in the rubric since that time. Nothing can be more clear than the view which the Church of England has taken upon the subject. It is very true that a great number of writers, men who have argued the question with great ability, with great ingenuity and great learning, have espoused different opinions upon this subject; and the references to authors of that description would be endless, if the Court were inclined to enter into the question at all.

Bishop Van Mildert, in his life of Waterland, expresses himself in these terms:—"The truth" (as to the validity or invalidity of lay baptism) "to be established must primarily depend upon its agreement with the Word of God, and the concurrent practice of the primitive Church. On a point not absolutely of fundamental importance, to espouse on the one side the opinions of such men as Lawrence," (who was the author of the Invalidity of Lay Baptism,)—"the opinions of such men as Lawrence, Brett, Leslie, and Waterland; or on the other, those of such opponents as Bingham, Burnet, Kennet, and Kelsall," (and to these may be added most unquestionably Bishop Fleetwood,) can "hardly be deemed discreditable to either party. We know that great and good men have differed, and still differ from each other on this point, without any diminution of mutual respect, or any intentional deviation from the doctrine or discipline of the Church."

Many authorities have been cited in the argument, and the Court has thought it its bounden duty to look into and examine the authorities so cited, and other parts of the writings of those authorities, for the purpose of seeing whether they do or do not differ in other parts of their works from that which is stated to be their opinion in the passages cited, and I find them strongly adhering to the opinions they had originally formed upon the subject.

Waterland, however, is an exception to this; for he, having originally espoused the doctrine of the validity of lay baptism, was afterwards converted to the opposite doctrine, and strongly and most ably and learnedly contended that lay baptism was invalid. He states, in the tenth volume of the edition of his works by the Bishop of Durham, in a letter written in the year 1713, (for all these books were written about this period of time, when this conceit of Dodwell is stated to have been put forth,) "I am not at all surprised at Mr. Kelsall," (who was in favour of the validity of lay baptism,)—"I am not at all surprised at Mr. Kelsall's judgment on the case. It is not very long since I was myself of the same opinion, being led to it, as I suppose he may, partly by the good nature of it, and partly by the authority of great names, as the Bishops of Sarum and Oxford, &c.; besides some passages of antiquity not well understood, and I was pleased, I confess, to see all as I thought con-

“ firmed by Mr. Bingham’s Scholastical History of Lay Baptism. “ But second thoughts and further views have given a turn to my “ judgment, and robbed me of a pleasing error, as I must now call “ it, which I was much inclined to embrace for a truth, and could “ yet wish that it were so.”

So that Waterland was in the first instance in favour of the validity of lay baptism, but was afterwards converted, as it appears from other parts of his works, by the writings of Mr. Lawrence. Mr. Lawrence, it appears, was a layman in the city of London who had been baptized by a Dissenting minister; he was dissatisfied in his own mind as to the validity of lay baptism, and he procured himself to be rebaptized by a curate of one of the parishes in London, and upon that occasion he wrote a very learned book, on the subject of the validity or invalidity of lay baptism, and discussed it with great ingenuity, with great learning, and with great ability. But his book, though extremely strong in argument against the validity of lay baptism, does not go directly to ascertain the view which had been taken of it by the Church of England. The argument of Lawrence, and the argument of Waterland after he came round to the opinion espoused by Lawrence, is against the abstract validity of it, that is, that it was invalid, as inconsistent with the intention of the Founder. They do not attempt either the one or the other, except in a very few passages, to deny that the Church of England had practised it, and that it was the practice of the Church. On the contrary, Waterland expressly states, though he is of opinion that lay baptism is invalid, that the practice of the Church of England and the stream of her divines are directly against him. Though upon second thoughts (sincere as he was in his latter opinions, as from every part of his works it is clear), he regarded the practice as invalid, yet nevertheless he admits that the Church of England had adopted a different opinion with respect to it.

The opinion of Bingham, as I have already stated, was strong that lay baptism was valid in the view of the Church of England, so was Mr. Kelsall, to whose letter Waterland is replying in part of the work to which I have been adverting. He states that the Church of Rome, ever since St. Austin, hath allowed not only laymen but even women, in cases of necessity, to baptize. And he states that he “ can produce canons of that Church requiring

“ the curates to instruct their people in the form of baptizing, that “ where necessity should require, they might know how to do it “ aright,” to which canons I have before adverted; “ which practice “ was so exceeding frequent among them, that it was morally impos- “ sible but that many of their clergy must be such as had in their “ infancy been so baptized.” He also states, “ that in some cases “ baptism by lay hands hath been permitted by the Church, and in “ no case (if administered with water, in the name of the blessed “ Trinity) altogether disannulled, so as that the receiver should be “ baptized anew. Most writers on both sides of the question allow “ this to have been the case ever since St. Austin, at least in “ the Western Church. And if we derive our sacraments, as we “ do the succession of our priesthood, through the corrupted “ channels of the Church of Rome, then I am very much afraid that “ an invalidity proved in the first, will infer an invalidity in the “ latter too.”

Bishop Fleetwood also, as I have already stated, expressed himself strongly in favour of the validity of lay baptism, according to the doctrine of the Church of England. It is unnecessary to refer more fully to him than I have already done, for the purpose of showing that his opinion was that, although the Church of England considered lay baptism to be irregular—though the bishops were to inquire after it in their visitations, and to censure the persons who had usurped the office of priest without authority, and subject them to punishment,—yet nevertheless the baptism was good, and ought not on any account to be repeated.

I will not therefore travel further into the authorities which have been cited upon this subject, with the exception of one upon whom great stress was laid in the course of the argument, and that is Wheatley upon the Common Prayer. He does certainly very strongly express his opinion as to the invalidity of that rite when administered by laymen, in the chapter “ Of the Order for the Burial of the Dead,” the first section “ Of the first Rubric.” “ Whether this “ office is to be used over such as have been baptized by the Dis- “ senters or Sectaries, who have no regular commission for the ad- “ ministering of the sacraments, has been a subject of dispute, “ people generally determining on one side or the other, according “ to their different sentiments of the validity or invalidity of such “ disputed baptisms. But I think that for determining the question

" before us, there is no occasion to enter into the merits of that cause, " for whether the baptisms among the Dissenters be valid or not, I " do not apprehend that it lies upon us to take notice of any bap- " tisms, except they are to be proved by the registers of the Church."

This will carry the doctrine a great deal too far, because it would apply to a great number of persons who, from misfortune in regard to their baptisms, had not been registered. And such an argument, therefore, detracts to a certain extent from his authority.

But Wheatley differs from other writers—from Nicholls, from Shepherd, and from Cosin, the Bishop of Durham.

The question, therefore, comes to this, as far as I have hitherto gone, namely, whether as far as we can rely on the authority of persons not entitled to lay down or to enact the law, but deserving of great attention as persons of great learning, piety, and ability, there is not sufficient to show,—notwithstanding all the writers on the other side of the question,—that the Church of England at least has looked upon lay baptism as valid, for the purpose for which it is at present necessary to consider the question.

There is, however, one writer upon the subject whose opinions it is not improper that the Court should refer to, because he is universally looked up to as one of the most judicious writers in the Church, and that is Hooker. Now Hooker was decidedly of opinion that lay baptism was valid. He says in his Fifth Book, which was first published in 1597 (c. 62,) " Hence the " Church of God hath always hitherto constantly maintained, that " to rebaptize them which are known to have received true baptism " is unlawful. If, therefore, at any time it come to pass that in " teaching publicly or privately, in delivering this blessed sacra- " ment of regeneration, some unsanctified hand, contrary to Christ's " supposed ordinance, do intrude itself, to execute that whereunto " the laws of God and his Church hath deputed others; which " of these two opinions seemeth more agreeable with equity, ours " (of the Church of England) that disallow what is done amiss, " yet make not the force of the word and sacraments, much less " their nature and very substance, to depend on the minister's " authority and calling, or else theirs (alluding to the Puritans) " which defeat, disannul, and annihilate both, in respect of that " one only personal defect, there not being any law of God which " saith, that if the minister be incompetent, his word shall be no

“ word, his baptism no baptism ?” Again, “ The grace of baptism “ cometh by donation from God alone. That God hath committed “ the ministry of baptism unto special men, it is for order’s sake “ in his Church, and not to the end that their authority might “ give being, or add force, to the sacrament itself.” He says, lastly, “ Whereas general and full consent of the godly learned “ of all ages doth make for validity of baptism, yea albeit adminis-“ tered in private, and even by women ; which kind of baptism, in “ case of necessity, divers reformed Churches do both allow and “ defend ; some others which do not defend, tolerate ; few, in com-“ parison, and they without any just cause, do utterly disannul and “ annihilate ; surely, howsoever, through defects on either side, the “ sacrament may be without fruit, as well in some cases to him “ which receiveth, as to him which giveth it ; yet no disability on “ either part can so far make it frustrate and without effect, as to “ deprive it of the very nature of true baptism, having all things “ else which the ordinance of Christ requireth.”

Nothing can more strongly show that this most learned and pious person, and most zealous supporter of the Church of England in his time, that is, at the time of Queen Elizabeth, notwithstanding that canon of 1575, (for this is twenty years afterwards,) held, that lay baptism was valid,—though it was irregular, though it was an intrusion upon the priest’s office and subjected the party to punishment for such intrusion.

I will not proceed any further with the examination of the writers upon this subject, whose names I have already mentioned. The different authorities, from the time of Tertullian down to the time of the Reformation, and the acts of the Church afterwards, to which most of these writers refer, necessarily lead to the conclusion, that, though lay baptism itself is irregular, the Church of England has always held it to be good and valid baptism and by no means to be repeated.

The different parts of the baptismal service seem to confirm that conclusion. The rubrics of Edward VI., of James I., and of Charles II., have been already quoted. The rubrics of Edward VI. were to the effect, that, in the administration of baptism in private houses, a layman, “ one of them that were present,” was to perform the ceremony, and the baptism so administered was declared to be sufficient. The rubric of James I. mentions a lawful

minister as the person by whom the rite was to be performed. The rubric of Charles II., which was confirmed by act of parliament, directs that the minister of the parish (or in his absence any other lawful minister that can be procured), with them that are present, shall "call upon God and say the Lord's Prayer, " and so many of the Collects appointed to be said before in the "form of public baptism as the time and present exigence will " suffer; and then the child being named by some one that is "present, the minister shall pour water upon it, saying these words, " 'I baptize thee,'" and so on; and in the rubrics both of James and Charles, instruction is given to the friends of the child, that they shall not doubt that the child is lawfully and sufficiently baptized, and ought not to be baptized again. The same expression is made use of in the rubrics of Edward VI., where a baptism of a child in a private house has been administered by a layman; and all the four rubrics contain a direction that the child shall be brought into the Church, to the intent that the congregation may be satisfied that the child has been sufficiently and lawfully baptized.

Now the questions which are to be addressed to the persons who bring the child to the church differ in some respects. In the liturgies of Edward VI., the questions addressed are six, they are as follows:—By whom was this child baptized? Who was present when this child was baptized? Whether they called upon God for his grace and succour in that necessity? With what thing and matter did they baptize the child? With what words was the child baptized? And whether they think the child was lawfully and perfectly baptized?

These were the questions, according to the rubrics of Edward the Sixth, which were addressed to the persons who brought the child to be received into the Church, after it had received private baptism from the hands of a layman, and they followed each other in immediate succession without break or interruption. The rubric then proceeded.—"If the minister shall find by the answers of such "as brought the child, that all things were done as they ought to be, " then shall he not christen the child again," but he shall certify that all has been well done and according to due order, concerning the baptizing of this child; and then he is to proceed in the form that is there pointed out.

Now at the conclusion of the rubric of Edward the Sixth, we

read,—“ But if they which bring the infant to the church do make “ an uncertain answer to the priest’s questions, and say that they “ cannot tell what they thought, did, or said, in that great fear and “ trouble of mind ; (as oftentimes it chanceth;) then let the priest “ baptize him in form above-written concerning Public Baptism, “ saving that at the dipping of the child in the font, he shall use “ this form of words : ‘ If thou be not baptized already, I baptize “ thee in the name of the Father, and of the Son, and of the Holy “ Ghost.’ ” That was the form to be observed, when it appeared that the persons, from trouble of mind at the time, could not answer certainly as to what had been done. That confirms the presumption that this private baptism was not expected to be administered by a person in holy orders, who could hardly be supposed to be in such trouble of mind as to be unable to state what passed at the time.

So the matter stood till the rubric of James the First. Then the questions were in some degree altered. The third question was omitted, and a most important variation took place with respect to the manner in which the questions were to be addressed to the parties. The two first questions in all the three rubrics were : “ By “ whom was this child baptized ?”—and, “ Who was present when “ this child was baptized ? ” In the rubric of James the First, instead of the question,—“ Whether they called upon God for his grace ? ”—this observation or caution, which appears to me most important in the consideration of this subject, is introduced before what were the fourth and fifth, and now are the third and fourth questions. “ And because some things essential to this sacrament “ may happen to be omitted, through fear or haste in such times of “ extremity, I therefore demand further of you,—‘ With what mat- “ ter was this child baptized ? With what words was this child bap- “ tized ? ’ ” The question which was the sixth in Edward the Sixth’s rubric became the fifth here, in the rubric of James, and is omitted in the present rubric,—“ Whether they thought the child to be sufficiently baptized ? ”

The introduction of the observation, that the matter and words are essential to the sacrament, appears to me to exclude the notion that the minister was an essential part of the administration of the sacrament. For if he was an essential part of the administration of the sacrament, the observation would have been introduced at the commencement, before the first question was asked : “ By whom was

the child baptized?" And it would then have run thus: "Because some things essential to this sacrament may happen to be omitted, therefore I ask you, by whom was this child baptized?" But that observation, as it now stands in the rubric, has no reference to the two questions that have gone before,—it is directly applied to those which follow: "With what matter was this child baptized?" and, "With what words was this child baptized?" Clearly, as it appears to me, showing that the matter and the words were the important parts of the sacrament, and that the minister, though, for order and regularity's sake he ought to be present at the time, and to administer the sacrament, yet was not an essential part of it. The same observation occurs in the same place, and precedes and introduces the same two questions, in the rubric of Charles II. An analogous alteration is made in the concluding rubric of the Liturgies of James I. and Charles II., and limits the conditional baptism to cases where "it cannot appear that the child was baptized with water, and in the name of the Father, and of the Son, and of the Holy Ghost," (which are essential parts of baptism,) for so the present rubric is worded.

All the other parts of the services which apply to it seem to confirm this view of the law. In the Church catechism, for instance, it is asked how many sacraments there are, and the answer is, "Two;" inquiry is made "How many parts are there in a sacrament?" the answer is again "Two, the outward and visible sign, and the inward and spiritual grace." Then comes the question, "What is the outward and visible sign or form in baptism?" to which the answer is, "Water, wherein the person is baptized, in the name of the Father, and of the Son, and of the Holy Ghost;" no mention being made of the minister as an essential part, and nothing even suggested as to his being an essential part of the sacrament, which is complete when the child has been baptized according to the rubric of Edward VI., with water, in the name of the Father, and of the Son, and of the Holy Ghost. I am clearly, then, of opinion, that the Church has not considered the minister as an essential part of the Sacrament of Baptism. It is very desirable that he should be present to administer it, and highly improper, excepting in cases of absolute necessity, that it should be administered by any other person, who, in so doing, usurps an office which does not belong to him; is meddling with things which are not

within his vocation, and therefore is liable to censure and to punishment. But, nevertheless, the services of the Church of England, as well as all the acts and declarations of the Church, when considered and compared together, appear to me perfectly consistent with each other in treating baptism administered in the name of the Father, and of the Son, and of the Holy Ghost, with water, as a sufficient administration of that sacrament, and show that the Church of England is as strongly against the repetition of baptism as was the Church in the early ages.

Something was said, in the course of the argument, with respect to the Articles of the Church; and Mr. Escott's allegation in proof, that the validity of baptism by laymen is inconsistent with them, refers to the 23rd Article, which declares that—"It is not lawful for any man to take upon him the office of public preaching, or ministering the sacraments in the congregation, before he be lawfully called, and sent, to execute the same."—And this is undoubtedly true; so that when a person does take upon himself the office of public preaching (supposing that this article against public preaching, or ministering the sacraments in the congregation, can by possibility be intended to apply to the private administration of baptism in cases of necessity,) he is taking upon him the office of a minister, and therefore he is doing that which is not lawful, and is liable to punishment. But the article does not go on to say, that if a person does so intrude himself, the act which he does shall be invalid. What is there in the services of the Church of England, in the rubrics, or in the spirit of the law, to show that an act done, though irregularly and improperly done, and though the person who does it is liable to punishment, is invalid, null and void?

Again, lay baptism is not more inconsistent with this Article at the present time than it was in the year 1552, when these Articles were originally framed, and yet it is admitted by the defendant that baptism by a layman was at that time valid.

Again, reference was made to the sixty-ninth canon, which is intituled, "Ministers not to defer christening, if the child be in danger," and which declares, "That if any minister, being duly, without any manner of collusion, informed of the weakness and danger of death of any infant unbaptized in his parish, and thereupon desired to go or come to the place where the said infant

“ remaineth, to baptize the same, shall either wilfully refuse so to do, or of purpose, or of gross negligence, shall so defer the time as when he might conveniently have resorted to the place, and have baptized the said infant, it dieth, through such his default, unbaptized, the said minister shall be suspended for three months, and, before his restitution, shall acknowledge his fault, and promise, before his ordinary, that he will not wittingly incur the like again.”

The argument founded upon this canon was, that the Church necessarily presumed that if the minister did not go, the child would die unbaptized, whereas if the Church had held that baptism by a lay person was valid, it could not have so presumed, inasmuch as it would presume that in case of imminent danger of the life of the child, the father or mother or other person would baptize the child.

This does not strike me as an argument of any great force. The Church supposes that every person will pay obedience to its laws—that no person will, by baptizing a child, intrude into that which the rubric of such Church seems to imply is the proper office of a lawful minister—of a person in holy orders, and the Church possibly supposes that the more conscientious and the more scrupulous persons are in conforming to the law of the Church, the greater danger there will be of the child dying unbaptized, through the neglect of the minister in not attending when sent for. There is nothing however in this canon inconsistent with the validity of lay baptism. It merely proceeds upon the supposition that a person wishing to obey the law of the Church, might decline taking upon himself the office of baptism, and that therefore the child might die unbaptized, in consequence of the minister not attending for the purpose of baptizing the child.

It has been also stated, that much is to be gathered from the opinions of other reformed Churches upon the subject of lay baptism; that the Churches in France had declared that persons who had been baptized by laymen, should be rebaptized, and I think a solemn declaration of the Scotch Church was cited, to show that they hold lay baptism to be invalid. Now if there was such a declaration in France, and not in other reformed Churches, it would seem to me to argue rather the other way. They may have been satisfied that lay baptism was invalid, and therefore they declared it to be so. The Church of England, not being satisfied that

lay baptism was invalid, on the contrary, holding it to be valid to a certain extent at least, did not issue any such declaration. When the Church of England holds out such an inducement as it does by the rubric at the end of the baptismal service, saying, that if the child dies, having been baptized without actual sin, it shall be saved; and when the parents are called upon to take the earliest possible opportunity to put the child in that state in which it may be considered entitled to salvation, I think it is beyond all possibility of doubt, that if it had been the doctrine of the Church of England that lay baptism was invalid, that Church would have expressly declared that a child baptized by lay hands was not lawfully baptized, and therefore must be rebaptized. The rubric says that " Children which are baptized dying before they commit actual sin, " are undoubtedly saved." The parents therefore are naturally anxious to put the child in a state in which it shall be entitled to salvation, and might take upon themselves the office of baptizing the child. The Church of England has made no declaration of the invalidity of baptism by lay hands, and I think it would have done so if its judgment were that lay baptism was invalid, contrary to the practice of the Church for 1200 years.

Then it seems to me upon the whole of this case, that the law of the Church is beyond all doubt that a child baptized by a layman is validly baptized. It has not been shown to my satisfaction that a Wesleyan minister is a schismatic or a heretic, and therefore it is unnecessary to inquire whether heretical or schismatical baptisms are or are not valid. There were many disputes in the early ages of the Church as to schismatical and heretical baptisms, and there are passages to be found in the canon law entering into discussions as to whether baptisms administered by schismatics or heretics ought to be repeated or not. The general opinion, I think, is, that they ought not to be repeated, provided the proper form was observed, for that was considered the essential point in these cases.

Therefore, in the view which I have taken, to my mind at least, it is clear, that the law calls upon me to pronounce that the articles admitted in this case have been proved; that the party promoting the office of the judge has established, that Mr. Escott, the minister and incumbent of the parish of Gedney, being duly informed, and having due notice of the death of the child, and due notice of the funeral, and being also duly informed that the child had been

baptized by a Dissenting minister, refused to perform the office for the interment of the dead over the body of that child ; and that Mr. Escott has failed in establishing, to my satisfaction at least, that the Church does consider a child baptized by an unordained minister, by a minister of the Wesleyan body who has no authority to baptize either from the Church, or from the body to which he belongs, (though they could confer upon him no authority which the Church would acknowledge, beyond that of a layman,) is not validly baptized ; and consequently has failed to establish, to my satisfaction at least, that the child in this case was unbaptized according to the doctrine of the Church of England, and according to the meaning of the rubric prefixed to the order for the burial of the dead. The sentence therefore which the Court must pronounce must be, that Mr. Mastin has sufficiently proved the articles by him exhibited, and that Mr. Escott has failed in proving the allegation by him given in.

The only remaining consideration is, what is to be the punishment to which the Court must necessarily subject Mr. Escott, under the circumstances of the case ? It has been very properly stated upon the part of the promoter, that he had no wish whatever to follow up these proceedings in any thing like a vindictive manner —that he should be perfectly satisfied if the Court would admonish Mr. Escott to abstain from like conduct in future, and to condemn him in the costs of these proceedings. In *Kemp v. Wickes* my learned predecessor contented himself with admonishing the party, and I should be glad to follow that example, if I could do so with propriety or safety. In that case there was no intention of appealing to a higher tribunal. But this case, I presume, will not stop here—it was stated, in the course of the argument, to have been brought here for the purpose of taking the opinion of the Ultimate Court of Appeal upon the question—and if I were to give any sentence other than that directed by the canon, I might possibly defeat the intentions of both parties, of getting the decision of the Court of Appeal upon the point, whether a person so baptized is validly baptized within the meaning of the rubric, so as to entitle him to Christian burial. I am afraid I am bound by the canon, which requires a sentence of three months' suspension upon a person who refuses to christen or to bury a child after notice given him for that purpose. I cannot see my way to modify

the sentence, this being a proceeding under the sixty-eighth canon, and that canon expressly fixing the punishment of suspension for three months.

Dr. *Phillimore*.—We should wish the Court to take into consideration, whether under any circumstances, the Court has not the power of mitigating—whether it is bound to go to the full extent of the sentence.

Sir HERBERT JENNER.—Is not the canon my statute? Supposing a person by act of parliament to be subject for the commission of an offence to a certain punishment, the judge has no power to mitigate it.

Dr. *Phillimore*.—The Court has always the sentence, to a considerable extent, in its own discretion.

The *Queen's Advocate*.—I think the canon leaves the Court no option. We should be very desirous that the sentence should be mitigated if it could.

Sir HERBERT JENNER.—I am quite sure of it—that is a very proper feeling. But the law leaves me no discretion—I must pronounce that the party is subject to suspension for three months, and also to the costs of the proceedings.

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## APPENDIX I.

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### EXTRACT FROM THE ANNALS OF QUEEN ANNE.

ON Wednesday, May 14th, 1712, the Lords the Bishops sent down the following paper to the Lower House of Convocation.

“ Forasmuch as sundry persons have of late, by preaching, writing and discourses, possessed the minds of many people in the communion of our Church with doubts and scruples about the validity of their baptism, to their great trouble and disquiet, we, the presidents and bishops, have thought it incumbent on us to declare, in conformity with the judgment and practice of the Catholic Church of Christ, and of the Church of England in particular, that such persons as have been already baptized in or with water, in the name of the Father, and of the Son, and of the Holy Ghost, though their baptism was irregular for want of a proper administrator, ought not to be baptized again. This we do to prevent, and (to use the words of Archbishop Whitgift) ‘not to bring confusion into the Church,’ for let men take heed that they usurp not an office whereunto they be not called, for God will call them to account for so doing; but to teach a truth, to take a yoke of doubtfulness from men’s consciences, and to resist an error not much differing from Donatism or Anabaptism.”

After reading of this paper in the Lower House, Dr. B——ks made a vehement speech for rejecting it, as a matter that countenanced schism and was in favour of the Dissenters, to relieve them again after passing the occasional bill. At last instead of rejecting they agreed upon the dropping of it, and carried by a great majority that the paper sent down from the bishops should not be considered during the sitting of synod concurrent with the present session of parliament. When the members on the other side complained of this manner of proceeding, the House appointed a Committee to draw up reasons for the said resolution, which was to consider why they had resolved not to consider their lordship’s paper upon this subject of Baptism.

On the 23d May the prolocutor of the Lower House carried up the following paper to the House of Lords:

“ The Lower House having on May 14 received from your lordships a paper relating to the validity of baptism administered by unauthorized persons, did enter into a debate thereupon, and thought it no ways proper to take into consideration the matter of that paper during the sitting of this Convocation, and have resolved to lay before your lordships some of the rea-

“ sons for which they declined entering into the consideration of the said  
“ paper.

“ I. Because the validity of such baptism is a point which the Catholic  
“ Church, and the Church of England in particular, hath hitherto avoided to  
“ determine by any synodical declaration.

“ II. Because the inconveniences manifestly attending such a determina-  
“ tion would, in their humble opinion, far outweigh the conveniences pro-  
“ posed by it, especially at a time when the divine authority of the priesthood  
“ is so openly struck at by some, and the advantage of an episcopal mission  
“ derived by an undoubted succession from the Apostles, is so much under-  
“ valued by others.

“ III. But, thirdly, were it thought proper synodically to consider and de-  
“ termine this matter, yet they humbly conceive that nothing of this kind  
“ ought to be done but in a full assembly of the clergy, after due notice  
“ given to all their members to attend and afford their assistance on so im-  
“ portant an occasion.”

On Friday, May 30th, Dr. Cannon, Archdeacon of Norfolk, desired leave to give in a protestation in writing against the paper relating to baptism, which had been carried up to the Lords the last synodical day, and having read it delivered it in at the table, and desired it might be entered into the acts of that day. After long debate it was rejected. And then several other members desired that they might enter their dissent against the said paper, and give their reasons for so doing. After much debate it was resolved, that any members there present might enter their dissent, but without giving any reason. And accordingly Dr. Willis, Dean of Lincoln, Dr. Kennett, Dean of Peterborough, Dr. Mandeville, Archdeacon of Lincoln, Dr. Gibson, Archdeacon of Surrey, Dr. West, Archdeacon of Berks, Dr. Innett, Precentor of Lincoln, and Mr. Martin, Proctor of the Church at Norwich, had their names entered by the actuary as dissenting from the said paper with Dr. Cannon. It is to be observed that the first of Dr. Cannon's reasons, in his written form of protestation, was to this effect, that the first reason given by the Lower House was by no means true, because that two of the four first General Councils, that of Nice and that of Constantinople, had already determined the validity of such unauthorised baptisms, as far at least as the bishops have now determined that matter.—*Annals of the Reign of Queen Anne*, vol. xi. p. 376—379.

## APPENDIX II.

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*Copies of Affidavits on applying for Rule Nisi in Rex v. Taylor,  
Trinity T., 6 Geo. I. and on showing Cause against same.*

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### IN BANCO REGIS.

ROGER MOORE, of Daventry, in the county of Northampton, yeoman; Hester Moore, of the same parish, spinster, daughter of the said Roger Moore; Mary Dunkley, of the same parish of Daventry; Francis Whitmore, of the parish aforesaid, labourer; and Ursula Evans, of the same parish, schoolmistress, widow, severally make oath that they well knew and were acquainted with Sarah Carter, late of Daventry aforesaid, deceased, and that she was born and bred in the said town of Daventry, and lived at the house of this deponent, Roger Moore, for the space of twenty years before her death, and was reputed to be a person of great piety and unblemished life and conversation, and that the said Sarah Carter died on or about the 5th day of March last: And this deponent, Hester Moore, for herself maketh oath that on the 7th day of the said month of March last the sexton of the said parish came of her own accord to the house of the said Roger Moore, and was ordered by this deponent's mother, being the sister of the said Sarah Carter, to dig a grave in the churchyard of Daventry aforesaid, near the ground where other of the relations of the said Sarah Carter had been buried, which the said sexton promised to do: But this deponent saith, that in some little time after the said sexton returned and informed this deponent's said mother and the rest of the family (then present), that Mr. Taylor, vicar of the said parish, had forbidden any grave should be dug for the said Sarah Carter in the said churchyard; whereupon this deponent went with the sexton to the said Mr. Taylor, and desired that the said Mrs. Carter, who was this deponent's aunt, might be buried in the said churchyard, and he asked this deponent whether she the said Sarah Carter had ever been baptized, to which this deponent answered yes, as in truth she had been, after the manner of the Protestant Dissenters called Baptists, or to that effect; whereupon the said Mr. Taylor replied, that he thought the said Sarah Carter was no Christian, that he looked upon her the said Sarah Carter to be no more than an heathen, and so not worthy to lye in the churchyard, and declared he would not bury the said Sarah Carter or suffer a grave to be digged for her in the said churchyard, or to that effect; whereupon this deponent telling him that most of her said aunt's relations, who were of the same profession

or judgment, were buried in the said churchyard, that she was informed they all had Christian burial, he answered, he was sorry for it, and that no such Dissenters should for the future be buried there while he was minister of the said parish, and desired that no more messengers should be sent to him, for he had told his mind at once, and the said Sarah Carter should not be buried in the said churchyard, and if ten messengers came to him it would all signify nothing: And this deponent, Mary Dunkley, for herself maketh oath that she this deponent went to the said Mr. Taylor after the said Hester Moore returned from him, and gave the service of the said Mr. Roger Moore and his wife to the said Mr. Taylor, telling him that they desired that he would bury the said Sarah Carter, to which he answered, that he would not do it for she was no Christian, and that she should not lye in the said churchyard, and bid the relations to take their course at law if they thought themselves grieved, or used words to that very effect and purpose; to which this deponent replied, that the relations and friends had nowhere else to bury her, and that therefore they would bring her to be interred that afternoon, to which the said Mr. Taylor answered, they might bring up the corpse if they pleased, but that she should not lye in the said churchyard: And these deponents, Francis Whitmore and Ursula Evans, for themselves severally make oath that on the said 7th day of March last, about six or seven of the clock in the same day, the corpse of the said deceased Sarah Carter was carried to the said churchyard in order to be interred, being attended in a decent manner by the relations and friends of the said deceased, but the churchyard gates were shut, so that the corpse could not be carried into the said churchyard; whereupon these deponents, Francis Whitmore and Ursula Evans, went from the said funeral company to the said Mr. Taylor's house, who refused to be spoken with, but the brother of the said Mr. Taylor, who was then in the said Mr. Taylor's house, came to these deponents, and thervpon they desired the gates might be opened and the corpse be buried, whereto the said Mr. Taylor's brother replied, they had their answer already, and might go about their business, for that the deceased should not be buried in the churchyard, inasmuch as she was no Christian, or to that effect; whereupon after the corpse and funeral company had stayed near an hour at the said churchyard gates, and were utterly refused entrance, the said corpse was again carried back to the house of the deponent Roger Moore, where it hath remained unburied ever since to this day.

Jur. apud Vill. North'ton. in Com.  
 North'ton. vicesimo-secundo die  
 Junii, anno regni Dni. nri. Georgii  
 nunc Regis Magnæ Britanniæ &c.  
 sexto. Coram JOHN Rose,  
 Un. Commid'.

The Mark of Roger + Moore,  
 Ellen Moor,  
 Mary Dunkley,  
 Francis Whitmore,  
 Ursula Evans.

In Banco Regis.

Dms. Rex v. Taylor.

Samuel Coombes, son of Sir John Coombes, Knight, deceased; Elizabeth Stephenson, of Daventry, in the county of Northampton, widow, and sexton of the parish of Daventry aforesaid; Francis Adson, clerk of the parish of Daventry aforesaid; and Samuel Pinckard, of Daventry aforesaid, one of the last year's and is one of the present churchwardens of the same parish, severally make oath, and this deponent, Samuel Coombes, for himself maketh oath that he was at the house of Mr. William Taylor, minister of Daventry aforesaid, situate in or near the churchyard in Daventry aforesaid, on or about the 7th day of March last past, when one Sarah Carter, late of Daventry aforesaid, deceased, was brought to be buried in the said churchyard; and this deponent, hearing some noise in the said churchyard, he went to the door of the dwelling-house of the said William Taylor, and seeing one Roger Moore, a relation of the said Sarah Carter, and at whose house she died, and one Francis Whitmore, standing at or near the door of the said house, after some discourse he this deponent acquainted the said Roger Moore and Francis Whitmore that they might bury the said Sarah Carter in the said churchyard, and that they would not meet with any hindrance or interruption whatsoever from any person, or to that effect: And this deponent further saith, that he heard the said William Taylor the same day give the said Elizabeth Stephenson orders to attend at the churchyard gate, and which goes to the church porch, there to attend with the key of the said gates, and to open the said gates that the said corpse might be carried into the said churchyard if any person demanded or desired the same, or to that effect: And this deponent further saith, that he was at the house of the said William Taylor on or about the 9th day of the said month of March, after the corpse of the said Sarah Carter was brought to be buried as aforesaid, when two persons brought the said William Taylor a letter, which he informed this deponent came from the chancellor of the diocese of Peterborough: And this deponent saith, that he heard the said William Taylor, after reading thereof, acquaint the said two persons that they might bury the said Sarah Carter in the said churchyard whenever they would, or to the same effect: And this deponent, Elizabeth Stephenson, for herself saith, that she generally keeps the key of the said churchyard gates, which are generally locked, and that she had it in her custody that day the corpse of the said Sarah Carter was brought to be buried as aforesaid, and that immediately after the bringing of the said Sarah Carter to be buried, the said William Taylor gave this deponent orders to be ready, and to attend at the said gates to open the same, in order to let the corpse of the said Sarah Carter be carried into the said churchyard, if any body desired or demanded the same, or to that effect: And this deponent saith, that pursuant to the orders of the said William Taylor, she did attend at the gates in a very little time after the said corpse was set down there, and stayed there till the said corpse was carried away, and would have opened the said gates and have let the said corpse have been carried into the said churchyard, if any body had

desired or requested the same : And this deponent saith, that no person or persons whatsoever then demanded or desired to have the said gates opened or unlocked, and further saith, that she then had the said key publicly in her hands, which any person might see, and believes the relations of the said Sarah Carter there present knew she had the key of the said gates in her possession : And this deponent further saith, that the Thursday after the corpse of the said Sarah Carter was brought to be buried as aforesaid, the said William Taylor gave this deponent orders to make a grave in the said churchyard to bury the said Sarah Carter in, which this deponent did the same day she had orders from the said William Taylor for that purpose, which grave has been ever since open, and is open to this day ; and further saith, that the same day she made the said grave she went and informed the wife of the said Roger Moore, at whose house the said Sarah Carter died, that the said grave was made for the said Sarah Carter to be buried in the churchyard aforesaid, and then acquainted the said wife of the said Roger Moore that it was near the place where the relations of the said Sarah Carter were buried : And this deponent, Francis Adson, for himself saith, that the day the corpse of the said Sarah Carter was brought to be buried as aforesaid, but before the same was brought to be interred, the said William Taylor gave this deponent orders to attend at the said churchyard gates, and not to molest the said persons that brought the said corpse in any thing they did, and pursuant to such orders this deponent was at the said churchyard gates when the said corpse was set down there, and stayed there a considerable time, and that he this deponent then saw the said Elizabeth Stephenson during that time attend at the said gates with the key thereof in her hand, but says he did not hear any person whatsoever desire or request to have the said gates opened or unlocked ; and these deponents, Elizabeth Stephenson and Francis Adson, do both say that there is another gate that goes into the said churchyard, over against a house in the possession of one Mrs. Lucas, which is generally open, and which was not locked the said day the said corpse was brought to be buried as aforesaid, and is about twenty-two yards distant from the said churchyard gates where the said corpse was set down, through which gates over against the house in the possession of the said Mrs. Lucas, the persons who brought the said Sarah Carter to be buried might have carried her into the said churchyard to be buried, if they and her relations had thought fit : And these deponents do both say, that the said gate over against the house in the possession of the said Mrs. Lucas was and is nearer to the place in the said churchyard where the relations of the said Sarah Carter have been buried, than the gate the said corpse was set down at as aforesaid, and that it was as convenient to have carried the said corpse into the said churchyard through the gate over against the house in the possession of the said Mrs. Lucas, as through the churchyard gates leading to the church porch of Daventry aforesaid : And this deponent, Francis Adson, saith, that the grave made by the said Elizabeth Stephenson to bury the said Sarah Carter lies open to them only : And this deponent, Samuel Pinckard, for himself saith, that he being churchwarden of the parish of Daventry as

aforesaid, and hearing the said Sarah Carter was carried to the said churchyard to be buried but was not, applied himself to the said William Taylor to have the key of the churchyard gates which lead to the church porch there delivered to him, which was done accordingly, and having got the key of the said last-mentioned gates in his custody, this deponent, within two or three days after the corpse of the said Sarah Carter was brought to be buried as aforesaid, went to the house of the said Roger Moore, where the said corpse then was, as this deponent hath been informed and believes, and asked the wife of the said Roger Moore and her daughter Ester Moore, why they did not bury the said Sarah Carter in the said churchyard, and then acquainted them that the said last-mentioned churchyard gates were open, that they might bury her where they liked in the said churchyard, and that the grave was made in the said churchyard for that purpose, and that if they disliked the place where that grave was made, they might make another grave in the said churchyard for her where they thought fit, and that they would not have any damage, interruption, or molestation in so doing, or to that effect; whereto the wife of the said Roger Moore and the said Ester Moore answered, that the said Sarah Carter should not be buried in the said churchyard unless this deponent would engage the bell should toll and the burying service of the church read for her, or to that effect: And this deponent, Samuel Pinckard, further saith, that he several times afterwards desired the said Roger Moore to bury the said Sarah Carter, and asked him the reasons why he would not bury her, to which the said Roger Moore answered, they had put it out of their hands or power, and could not then do as they would, and that the Baptists had taken up the cause, or to that effect.

Jur. apud Daventree in Com. North'ton.  
decimo septimo die Novembris,  
anno regni Regis Georgis II. sep-  
timo. Coram  
VALL. TOWNSEND,  
Com. &c.

Samuel Combes,  
The Marks of  
Elizabeth + Stephenson,  
Francis + Adson,  
Samuel + Pinckard.

In Banco Regis.

William Taylor, minister of Daventry, in the county of Northampton, maketh oath, that in the evening of the 9th day of March last past, two persons whose names he was informed were John Trepas and William Dunckley, brought this deponent a letter from Dr. Reynolds, Dean of Peterboro', and chancellor of that diocese, which this deponent read, and after reading thereof, one of the said two persons asked this deponent if he would give leave for the corpse of Sarah Carter, late of Daventry aforesaid, spinster, deceased, to be buried in the churchyard of Daventry aforesaid; to which this deponent answered, they might bury her in the said churchyard as soon as or when they would, or to that effect: And this deponent further saith, that the said William Dunckley then asked this deponent if he would read the burial service for the said Sarah Carter; to which he replied,

that he did not care to do that, not being satisfied that the said Sarah Carter was baptized, or to that purpose, to which the said John Trepas said, we don't insist on that, we shall be satisfied if this deponent would permit the said Sarah Carter to be buried in the said churchyard, or to that effect, and so they both went away from this deponent well satisfied as he thought: But this deponent saith, that the next morning, being the 10th day of March last, the said William Dunckley came to this deponent and told him that the friends and relations of the said Sarah Carter were resolved not to bury her unless this deponent would read the burial service for her, or to that effect, to which this deponent replied, that he could not do that, but however he would order a grave to be made in the said churchyard for the said Sarah Carter, where they might bury her if they thought fit, or to that effect: And this deponent further saith, that when the key of the aforesaid churchyard gates which lead to the church porch there were by this deponent's order delivered to Samuel Pinckard, one of the churchwardens of Daventry aforesaid, on or about the 10th day of March last past, this deponent did desire the said Samuel Pinckard to go to the friends and relations of the said Sarah Carter and talk with them, and do what he thought fit in the matter about burying the said Sarah Carter, that this deponent would agree to what the said Samuel Pinckard should do therein, or to that purpose: And this deponent further saith, that he is neither rector or vicar of Daventry aforesaid, neither has he ever had any institution or induction to the cure of Daventry aforesaid from the bishop, archdeacon, or any other person whatsoever in this diocese, but that he is only the minister or curate of Daventry by grant from the Dean and Chapter of Christ Church, in Oxford, to whose patronage the curacy of Daventry does belong.

Jur. apud Daventree, sexto die Febr.  
ruarij, anno regni Regis Georgii  
&c. septimo. Coram  
VALL. TOWNSEND,  
Com. &c. } William Taylor.

In Banco Regis.

Dms. Rex & Taylor.

William Taylor, minister of Daventry, in the county of Northampton, Thomas Banks, of Daventry aforesaid, and Samuel Pinckards, of Daventry aforesaid, churchwardens of the parish of Daventry aforesaid, do severally make oath, and this deponent William Taylor for himself maketh oath, that one John Humfrey, the 28th day of December last, came to the door of this deponent's house in Daventry aforesaid, with two or three persons more; and the said John Humfrey or some or one of those persons inquiring for this deponent, he came to the door of his said house, where seeing John Humfrey and the said persons, the said John Humfrey presently began to read a paper he had in his hand: but this deponent being alone, and seeing so many persons together, did not think fit and proper for him to

stay with them, and therefore he immediately went away from them, without hearing what the said John Humfrey or those persons had to say to him: And this deponent saith, that he being afterwards acquainted that the said John Humfrey and the said other persons came to this deponent the said 28th day of December last, with an intent to desire him to permit Sarah Carter, late of Daventry aforesaid, spinster, to be buried in the churchyard of Daventry aforesaid, on Thursday the 5th day of January last past, this deponent did on the 30th day of the said month of December last past, desire the said Thomas Banks that he and the said Samuel Pinckard would go and acquaint Roger Moore and his wife (near relations of the said Sarah Carter, at whose house she died, and where she then lay as this deponent has been informed and believes) that they might bury the said Sarah Carter in the said churchyard of Daventry aforesaid, whenever they thought fit: And this deponent further says, he is willing that the said Sarah Carter may be buried in the said churchyard, when and where her relations think fit: And these deponents Thomas Banks and Samuel Pinckard do both for themselves severally and jointly say and make oath, that pursuant to the order and desire of the said William Taylor, they these deponents did on Saturday the one and thirtieth day of December last past, go to the house of the said Roger Moore; and the said Thomas Banks, in the presence and hearing of the said Samuel Pinckard, then and there acquainted the said Roger Moore and his wife that they might bury the said Sarah Carter in the said churchyard of Daventry aforesaid when they thought fit, and at the same time the said Thomas Banks acquainted the said Roger Moore and his wife, that if they did not like the said grave that was made to bury the said Sarah Carter in, another grave should be made for her, in such place of the said churchyard where they would, or to that effect: And these deponents do all say, that they do not know that any time or times since a motion was made in Trinity Term last, for an information against the said William Taylor, that Ann Moore, Ann Bird, Sarah Bird, and Mr. Foster, or any or either of them, or any Dissenter or Dissenters living in the parish of Daventry aforesaid, or any other person or persons whatsoever, were insulted, abused, or threatened to be insulted, beat, or abused by the mob or mobbing people of the said town, or by any other person or persons whatsoever: And these deponents do all say, that if the said Ann Moore, Ann Bird, Sarah Bird, and Mr. Foster, or any of them, or any other Dissenter or Dissenters living in the said town of Daventry, were insulted, abused, or threatened by any person or persons whatsoever, the same was done without the privity, knowledge, means, assent, or procurement, and contrary to the desire of these deponents, any or either of them: And this deponent, William Taylor, for himself further saith, that he did not know that the said Humfrey was administrator to the said Sarah Carter, but by the affidavit of the said Humfrey; and thereupon he this deponent did, upon the first day of this instant February, desire the said Thomas Banks that he and the said Samuel Pinckard would acquaint the said Humfrey that he might bury the said Sarah Carter in the said churchyard of Daventry aforesaid, when and where

he would, or to that effect: And these deponents, Thomas Banks and Samuel Pinckard, for themselves jointly and severally say, that both of these deponents did, on the 2nd day of this instant February, go to Welton, in the said county of Northampton, where the said Humfrey lives; and the said Thomas Banks did then and there, by the order of the said William Taylor, in the presence and hearing of the said Samuel Pinckard, acquaint the said Humfrey, that he might bury the said Sarah Carter when and where he pleased in the said churchyard of Daventry or to that effect, whereto the said Humfrey then replied, it was too late, or to that purpose.

Jur. apud Daventry, tertio die Febr  
ruarij, anno regni Regis Georgii  
septimo. Coram  
VALL. TOWNSEND,  
Com. &c.) } William Taylor,  
Thomas Banks,  
Samuel Pinckard.

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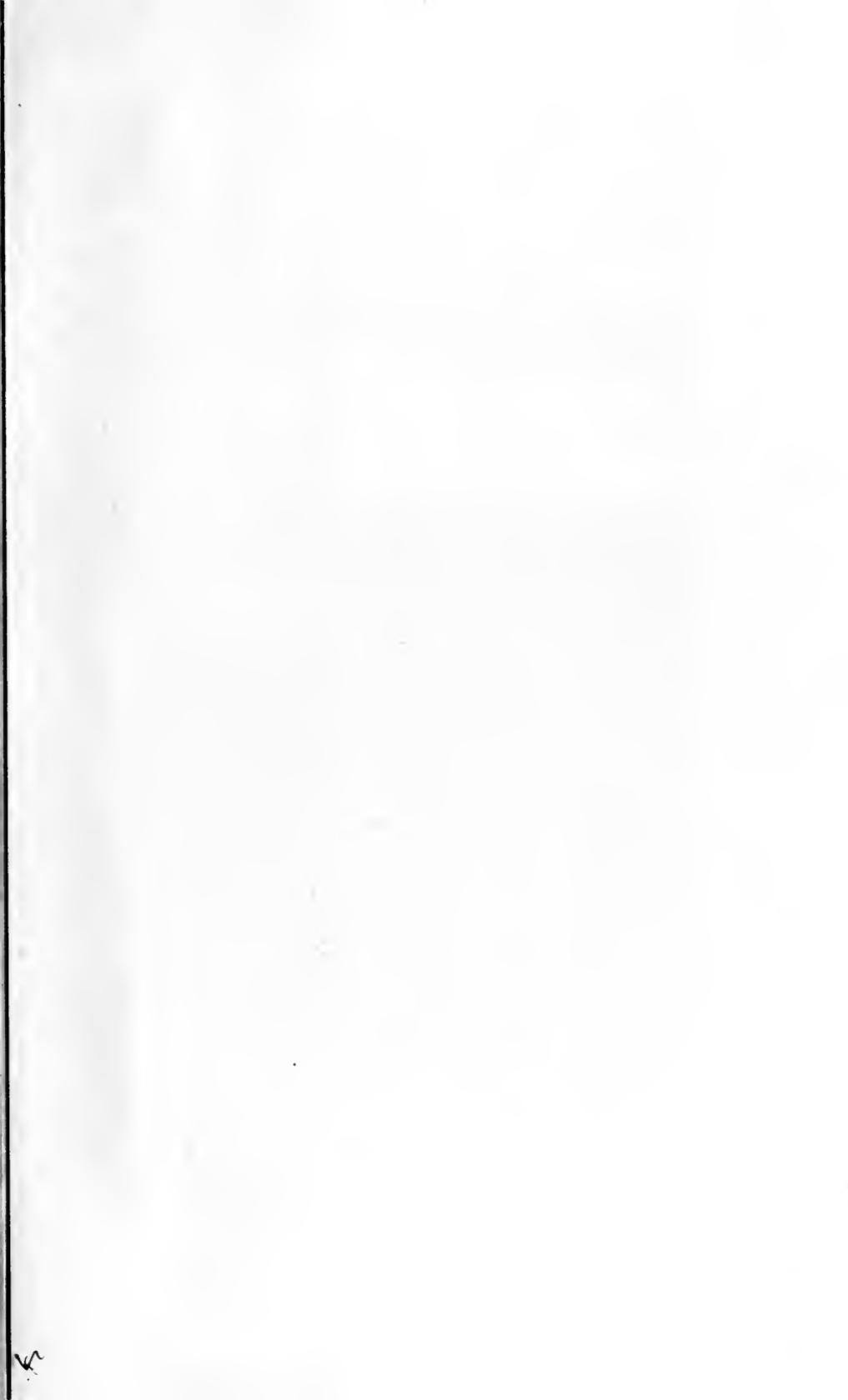
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